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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DEBRA BLACK,

Petitioner,

v.

ZARING HOMES, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHERE AN EMPLOYEE IN A TITLE VII SEXUAL HARASSMENT CASE ADDUCES SUBSTANTIAL EVIDENCE OF GENDER-BASED VERBAL SEXUAL HARASSMENT DIRECTED TOWARD HER BY VARIOUS MALE EMPLOYEES IN THE SUPERVISORY HIERARCHY OF HER EMPLOYER, WHAT CRITERIA SHOULD FEDERAL COURTS EMPLOY IN DETERMINING WHETHER THE CONDUCT ALLEGED AGAINST THE EMPLOYER WAS SUFFICIENTLY *DE MINIMIS* SO AS TO RENDER THE EMPLOYEE'S SEXUAL HARASSMENT ALLEGATIONS NON-ACTIONABLE?

2. WHERE A TITLE VII PLAINTIFF HAS ADDUCED EVIDENCE AT TRIAL THAT SEVERAL GENDER-BASED HOSTILE REMARKS WERE DIRECTED TO HER BY VARIOUS MEMBERS OF THE ALL-MALE SUPERVISORY HIERARCHY OF HER EMPLOYER, INCLUDING ITS PRESIDENT, AND THE PLAINTIFF'S COMPLAINT TO THE EMPLOYER'S GENERAL COUNSEL ABOUT THE HARASSMENT WAS IGNORED, TO WHAT EXTENT MAY THE REVIEWING COURT SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF A JURY AND SET ASIDE A JURY VERDICT TO THE EFFECT THAT THE EMPLOYER'S CONDUCT TOWARD PLAINTIFF WAS SUFFICIENTLY SEVERE AND PERVASIVE SO AS TO CREATE AN OBJECTIVELY HOSTILE WORK ENVIRONMENT?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner requests that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on January 14, 1997, which reversed a jury verdict rendered on behalf of Petitioner in the United States District Court for the Southern District of Ohio, Western Division on March 31, 1995 and which also reversed the Magistrate Judge's denial of Respondent's post-trial motion for a judgment as a matter of law entered on December 27, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals is contained in the Appendix at App. 1, and is reported as *Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997). The opinion of the Magistrate Judge of the United States District Court for the Southern District of Ohio, Western Division is contained in the Appendix at App. 13, and is not reported. It is cited as *Black v. Zaring Homes, Inc.*, Case No. C-1-94-471 (S.D. Ohio December 27, 1995). The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing and Rehearing *En Banc* is contained in the Appendix at App. 36, and is not reported. It is cited as *Black v. Zaring Homes, Inc.*, Case No. 96-3118 (6th Cir., April 25, 1997).

JURISDICTION

The opinion of the Court of Appeals to be reviewed was entered on January 14, 1997. The Court of Appeals' denial of Petitioner's Petition for Rehearing and Rehearing *En Banc* was entered on April 25, 1997. Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit in this cause, by writ of certiorari, is conferred on this Court by 18 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 - 42 U.S.C. § 2000e 2(a)(1) reads as follows:

> **(a) Employer practices.** It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

STATEMENT OF THE CASE

Petitioner Debra Black was hired by Respondent Zaring Homes in late June of 1993 as Land Acquisition Manager to seek out vacant parcels of land for purchase by Zaring Homes so that it could then develop the land and build houses upon them for sale.

After Petitioner started her employment, she began to identify numerous parcels of land for sale upon which she would report at bi-weekly land meetings at Respondent's corporate offices. Customarily in attendance at these meetings would be Petitioner, her immediate supervisor, Respondent's President, Vice President and in-house General Counsel, and the various managers in charge of Respondent's product line of homes, all of whom were male.

Shortly after beginning employment, Petitioner became subjected to an ongoing pattern of various gender-specific jokes and insults by various members of Respondent's management at the land meetings.

Early on in her employment Petitioner passed around a plate of breakfast pastries. When the plate was passed to one of Respondent's Product Managers, he selected a pastry, and said, while grinning at her and suggestively wiggling his eyebrows "Nothing I like more in the morning than sticky buns." Petitioner reacted by stating "Tim, cut it out" whereafter the other men started laughing.

Sometime in mid-August, 1993 the land meeting participants discussed the purchase of a parcel of land adjacent to a Hooters Restaurant. This engendered a spirited discussion as to what to name the development. Various of the male attendees volunteered such titles as "Hootersville," "Twin Peaks," and "Titsville." This banter engendered a great deal of laughing and smirking by the male attendees at the meeting. These references to "Titsville" and the like took place at more than one land meeting thereafter. These comments were also made in

the presence of Respondent's President who either joined in the merriment or did nothing to stop it.

In a similar vein in September of 1993 when Petitioner reported at a land meeting as to the potential purchase of a property owned by a Dr. Paul Busam, various male attendees began snickering over the reference to a female's breast. This continued on other subsequent occasions whenever the name of the Busam property was brought up.

On or about October 8, 1993 the attendees were again discussing a new parcel of land for potential purchase and development which was located adjacent to a bar frequented by motorcyclists. Suddenly, for no apparent reason, Respondent's President, turned to Petitioner and said "Say, weren't you there Saturday night dancing on the tables?" Predictably, the meeting again exploded in laughter. Petitioner, again extremely embarrassed, looked down and responded "Not hardly, Ron."

Other sexist insults were directed towards Petitioner on a one-on-one basis. During a discussion with her immediate supervisor over how much commission she should be earning, the supervisor, angered by what he perceived as overreaching demands for more compensation, stated "You are paid great money for a woman."

Petitioner's supervisor conveyed even more gender-specific insulting remarks to Petitioner while he was speaking with a co-worker concerning another female's reluctance to sign a permit. The supervisor told the co-worker in the direct presence of Petitioner and looking straight at her, "Just get the broad to sign it."

In addition to registering her disapproval of various of the above-cited remarks, Petitioner, early on in her employment, complained directly to Respondent's Vice President and General Counsel about the general tenor of the gender-based remarks made at the land meetings, and asked what could be done about it. The General Counsel's response was that the male supervisors' attitudes toward women were a fact of life and that nothing could be done to change the atmosphere.

Petitioner filed her original Complaint in the United States District Court for the Southern District of Ohio, Western Division on July 11, 1994, alleging *inter alia* sexual harassment by Respondent. This action was properly heard by the United States District Court for the Southern District of Ohio, pursuant to 28 U.S.C. § 1331, in that this action presented a federal question arising under the laws of the United States, specifically, 42 U.S.C. § 2000e *et seq.* The remaining pendant state claims were properly heard pursuant to 28 U.S.C. § 1367 and Fed. R. Civ. P. 18(a). After a nine day trial, the jury awarded $250,000.00 to Petitioner, $200,000.00 of which was for punitive damages. The District Court on December 27, 1997, denied Respondent's Motion for Judgment *n.o.v.*, Motion for New Trial and Motion for *Remittitur* on the issue of compensatory and punitive damages.

Respondent filed a timely appeal to the United States Circuit Court of Appeals for the Sixth Circuit. On January 14, 1997, the Sixth Circuit panel hearing the case reversed the jury verdict and entered judgment for Respondent. On April 25, 1997, the Sixth Circuit Court of Appeals denied Petitioner's Motion for Rehearing and Rehearing *En Banc.*

The Sixth Circuit accepted as true, for purposes of analysis, all of the aforesaid factual allegations, which formed the predicate for the jury's finding of the sexually oppressive work environment. Moreover, the Sixth Circuit correctly cited the landmark United States Supreme Court decisions in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), as providing the appropriate analytical framework for determining when a work environment is sufficiently severe to be actionable under Title VII of the Civil Rights Act. The Sixth Circuit dwelled in particular on the recent holding of the Supreme Court in *Harris* to the effect that the workplace harassment must be sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive, and that the victim subjectively regarded as abusive.

The Sixth Circuit also properly quoted *Harris* as to the proper factors a jury must consider when deciding whether the verbal harassment of a female employee met this standard:

> [T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris at 23.

However, after accurately setting forth the methodology for analyzing cases of this nature, and showing proper deference to the role of a jury in making the appropriate judgements as to whether the Defendant's conduct met this objective standard, the Sixth Circuit ignored the *Harris* factors altogether and, without a factual analysis of the evidence in this particular case, summarily concluded that the verbal harassment directed at Petitioner was not "severe or pervasive enough to create an objectively hostile work environment." No empirical evidence was cited for this sudden proclamation other than the Sixth Circuit's observation that "most of the comments were not directed at plaintiff [Petitioner]".

ARGUMENT

I. QUESTIONS PRESENTED FOR REVIEW

1. WHERE AN EMPLOYEE IN A TITLE VII SEXUAL HARASSMENT CASE ADDUCES SUBSTANTIAL EVIDENCE OF GENDER-BASED VERBAL SEXUAL HARASSMENT DIRECTED TOWARD HER BY VARIOUS MALE EMPLOYEES IN THE SUPERVISORY HIERARCHY OF HER EMPLOYER, WHAT CRITERIA SHOULD FEDERAL COURTS EMPLOY IN DETERMINING WHETHER THE CONDUCT ALLEGED AGAINST THE EMPLOYER WAS SUFFICIENTLY *DE MINIMIS* SO AS TO RENDER THE EMPLOYEE'S SEXUAL HARASSMENT ALLEGATIONS NON-ACTIONABLE?

In its two previous landmark decisions dealing with the issue of sexual harassment, *Meritor Savings Bank v.*

Vinson, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the United States Supreme Court has taken a rather expansive view of what constitutes actionable sexual harassment. In *Meritor Savings Bank*, the Supreme Court held that Title VII "is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions or privileges of employment' evinces a Congressional intent to *strike at the entire spectrum* of disparate treatment of men and women." *Id.* at 64 (emphasis added). The Supreme Court further stated that a woman had the right to a work environment free from " . . . intimidation, ridicule or insult." *Id.* at 65. A finding of a Title VII violation based on verbal harassment alone was clearly contemplated. The Supreme Court held that the "terms, conditions or privileges of employment" should be interpreted expansively. *Id.* at 65.

In the second case in which the Supreme Court had a chance to address the issue of sexual harassment, *Harris v. Forklift*, the Supreme Court condemned a work environment in which the female plaintiff was forced to work as one in which the supervisor "insulted her because of her gender and often made her the target of sexual innuendos." *Id.* at 19.

To be sure, not all verbal comments directed at a member of the opposite sex were deemed actionable. The Supreme Court set minimum *de minimis* guidelines below which such conduct would be deemed non-actionable. In *Meritor*, the Supreme Court emphasized that not all workplace conduct of a sexual nature amounted to actionable sexual harassment under Title VII. Rather, it had to be sufficiently egregious to affect a "term or condition or privilege" of employment in order for the conduct to be

regarded as violative of Title VII. *Meritor* at 67. Likewise, in *Harris v. Forklift, supra*, the Supreme Court stated that an employer should not be accountable for conduct by their employees against members of the opposite sex which is "merely offensive". *Id.* at 21. The Supreme Court did not go into detail as to what types of conduct might be deemed "merely offensive". Instead, the Court laid out a series of criteria whereby a trier of fact, either a court or a jury, could determine whether the conduct complained of rose to the level of aggravation and severity so as to constitute unlawful sexual harassment:

1. The frequency of the discriminatory conduct;
2. Its severity;
3. Whether it is physically threatening or humiliating or a mere offensive utterance; and
4. Whether it unreasonably interferes with an employees performance.

Id. at 23. The Supreme Court indicated that this list of criteria was "non-exhaustive". *Id.*

The Supreme Court did not define, either in *Meritor* or in *Harris*, the type of conduct which it would regard as "insufficiently severe" or "merely offensive" and thus beyond the purview of Title VII scrutiny by the federal courts. However, in the wake of these two landmark decisions, the various Circuit Courts of Appeal have addressed the issue. There appears to be a split in the various Circuit Courts of Appeal as to whether workplace harassment, especially verbal workplace harassment such as the type addressed in this case, falls above or below

the *"de minimis"* line as set forth in *Harris*. A more conservative or restricted view of what constitutes verbal workplace harassment has been adopted by the Seventh and Tenth Circuit, whereas a more liberal and expansive view of what constitutes workplace sexual harassment has been embraced by the Second, Third, Eighth and Ninth Circuit.

The lead case coming out of the Seventh Circuit is *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995). In *Baskerville*, the plaintiff was exposed litany of highly offensive gender-specific remarks by her supervisor, the most egregious including the following: (1) he would call her a "pretty girl"; (2) once, when she was wearing a leather skirt, he made a grunting sound that sounded like "um um um" as she turned to leave the office; (3) when she said that his office was hot, he remarked to her "Not until you stepped your foot in here"; (4) in response to a public announcement over the loud speaker "May I have your attention please", he responded to her "you know what that means don't you, all pretty girls run around naked"; (5) he stated to her during a Christmas party, that since there were so many pretty girls in there he didn't want to lose control, so he thought he better leave early; (6) he remarked to her that his wife had not yet moved to join him in his new job and all he had at night for company at his hotel was his pillow. He then pantomimed an act of masturbation. *Baskerville* at 430.

The Seventh Circuit characterized all of these comments as "occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers" that was "merely vulgar and mildly offensive". *Id.* at 431. The Seventh Circuit ultimately reversed the lower court's

finding of actionable sexual harassment. In minimizing the impact of the statements set forth above, the Court reasoned:

> Only a woman of victorian delicacy – a woman mysteriously aloof from contemporary American popular culture and all its sex saturated vulgarity – would find Hall's [the supervisor] patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.

Id. at 431.

A more recent expression of the Seventh Circuit's restrictive view of workplace harassment was expressed in *Gleason v. Mesirow Financial, Incorporated*, ___ F.3d ___, 1997 U.S. App. LEXIS 15508 (7th Cir. 1997). In *Gleason*, the female plaintiff was subjected to the same type of rude, vulgar and insulting conduct that her counterpart encountered in *Baskerville*. Her supervisor referred to female customers as "bitchy", "dumb", or "suffering from PMS", spoke to another female employee about the size of her breasts, told another female employee that he would like her in tighter skirts, and ogled at women as they walked by. He also placed an advertisement for a nudist colony on plaintiff's desk and told her that he had had dreams about holding hands with her.

Gleason, like *Baskerville*, created a dichotomy between a "merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other". *Id.* at 32. It echoed the sentiment articulated in *Baskerville* that Title VII "was not designed to purge the workplace of vulgarity". *Id. Gleason* also minimized the impact of various gender-hostile remarks which were

brought to plaintiff's attention because they had not been directed to her personally, but rather were comments that she had learned about second-hand. *Id.* at *33-34.

In closing, the Seventh Circuit boldly announced:

> It is established in this Circuit as of this date that there is a "safe harbor" for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of sex. [Citing an earlier Seventh Circuit decision in *Galloway v. General Motors*, 78 F.3d 1164, 1168 (7th Cir. 1996)].

Gleason at *33.

Judging on the job sexual harassment in the context of off-the-job community standards was also echoed by the Tenth Circuit in *Gross v. Burggraf Construction Co.*, 53 F.3d 1531 (10th Cir. 1995). *Gross* involved the harassment of a female employee on a blue-collar construction site. The Tenth Circuit in *Gross* established a two-tiered standard for reviewing claims of sexual harassment one for blue-collar working environments and one for white-collar working environments.

> Accordingly, we must evaluate Gross's claim of gender discrimination in the context of a blue-collar environment where crude language is commonly used by male and female employees. Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other working environments.

Gross at 1538. Pursuing this theme further, the Tenth Circuit quoted directly from an earlier pre-*Meritor*,

pre-*Harris* case in the Sixth Circuit Court of Appeals, *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419 (E.D. Mich. 1984), aff'd 805 F.2d 611 (6th Cir. 1986):

> The standard for determining sexual harassment would be different depending upon the work environment. Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jobs, sexual conversations, and girlie magazines may abound. Title VII was not meant to – or can – change this.
>
> While the Court emphasized that Title VII was designed to ensure equal opportunity for women in the workforce, "it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers." [citing *Rabidue, supra*].

Id.

As noted earlier, federal courts in other circuits have adopted a far more liberal view of what constitutes sexual harassment, oftentimes rejecting the very same factors relied upon by the Seventh and Tenth Circuit. For instance in *Torres v. Pisano*, ___ F.3d ___ 1997 U.S. App. LEXIS 12805 (2nd Cir. 1997), the Second Circuit was faced with much of the same types of crude verbal sexual comments which had been directed by the supervisors toward a female employee in *Gross, Gleason* and *Baskerville*. While the Court cited the well-established *Harris* guidelines that plaintiff needed to prove that the harassment was of such a quality that a reasonable employee would find the conditions objectively hostile, *Torres* took special pains to eschew the "public mores" standard earlier articulated by the Seventh Circuit in *Baskerville*.

> Judges should be careful to remember that American popular culture can, on occasion, be highly sexist and offensive. What is, is not always what is right, and reasonable people could take justifiable offense at comments that the vulgar among us, even if they are in a majority, would consider acceptable.

Torres at *17, n.7.

The Second Circuit went on to state:

> No principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.

Id. at *17 [citing *King v. Hillen*, 21 F.3d 1572, 1582 (Fed. Cir. 1994)].

Torres also minimized the fact that many of the statements alleged to be harassing were not made directly to the plaintiff, reasoning that when a plaintiff is aware that management freely makes offensive gender-based remarks to others, her workplace environment may still be rendered hostile. *Id.* at *18.

The Third Circuit in *Spain v. Gallegos*, 26 F.3d 439 (3rd Cir. 1994), found sexual comments far less egregious than those which existed in *Baskerville, Gleason* or *Gross* to be unlawful in that they merely allowed a perpetuation of a rumor that the plaintiff was having an affair with her

boss. The key issue in the case, reasoned the Third Circuit, was not whether there existed blatant sexual misconduct, but whether women in the workplace were treated differently than men, and whether she would have been subject to the same treatment by management and her coworkers had she been a man. *Spain, supra* at 447-448. See also *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 441 (1st Cir. 1997).

Similar sentiments were expressed by the Eighth Circuit in *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997). *Smith* again involves relatively low levels of sexual discourse which hardly could be determined to be blatant. Plaintiff, an anesthesiology resident at the hospital, was oftentimes the butt of remarks by the Anesthesiology Department Chairman, who would refer to the female residents by their first name without the title of "Doctor", whereas he would use the appropriate title for male residents. The Chairman, as well as other male doctors, at various times referred to plaintiff as a beautiful young lady who should consider modeling and on another occasion referred to her and another female resident as "anesthesia babes". The relatively low voltage nature of these comments did not deter the Eighth Circuit from finding that the plaintiff had successfully established an actionable hostile work environment. While her contact with the offending director was infrequent or sporadic, the Court noted that the harasser was the head of the department and "therefore more omnipresent than a co-worker might be." *Smith* at 1264. More importantly, while the nature of the gender-based remarks was relatively benign, the key element upon which the Court relied was

the fact that these remarks were selectively directed at women rather than men.

> The predicate acts which support a hostile environment sexual harassment claim need not be explicitly sexual in nature . . . Rather the key issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. [Citing *Kopp v. Samaritan Health Systems*, 13 F.3d 264, 269 (8th Cir. 1993)].

Id. at 1265.

Therefore, since the plaintiff and her female colleagues were subjected to specific minimalization and ridicule not directed toward male counterparts, the plaintiff successfully made out an actionable case of sexual harassment under Title VII.

The same crucial distinction between general vulgar, rude or tasteless comments directed at employees in general versus female employees because of their gender was also emphasized by the Ninth Circuit in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994). Plaintiff in *Steiner* was allowed to take her case to trial based on hostile insulting language directed toward her, notwithstanding the employer's argument that the offending supervisor used crude language and hostility toward male employees as well. However, the Ninth Circuit was careful to emphasize that the verbal abuse shown to women was qualitatively different than the abuse shown to men because sexual epithets were attached thereto. The Court emphasized that "while his [the offending supervisor's] abuse of men in no way related to their gender, his abuse of female employees, especially Steiner

[the plaintiff], centered on the fact that they were females. *It is one thing to call a women 'worthless', and another to call her a 'worthless broad' ".*

Id. at 1464 (emphasis added).

The Sixth Circuit in the instant case, *Black v. Zaring Homes,* appears to have followed the same restrictive view of what constitutes workplace sexual harassment as does the Seventh and Tenth Circuit. The Sixth Circuit, without analyzing this case according to the numerous criteria laid out in *Harris,* nonetheless concluded that the sum total of the harassment directed at Petitioner by Respondent, while admittedly offensive, inappropriate, unprofessional and gender-based, did not rise to the level of severity to create an objectively hostile work environment. It carved out, as the Seventh and Tenth Circuit seem to have carved out, another "safe harbor" for employer whereby gender-based put downs and insults, be they in the form of anatomical references, sexual jokes, or words of trivialization such as babes or broads, may be deemed non-actionable under the rubric of mere "vulgarity". Indeed, the Sixth Circuit in *Black* echoes the sentiment expressed by the Seventh Circuit in *Baskerville* that Title VII was not designed to purge the workplace of vulgarity. (App. 11).

The Sixth Circuit also discounts the oppressiveness of the work environment at Petitioner's workplace, finding that many of the sexually offensive gender-based comments were not directed to Petitioner but merely in her presence. (App. 10). Again, the Sixth Circuit appears to be adhering to the more conservative Seventh Circuit approach articulated in *Gleason, supra,* where statements

that a plaintiff merely overhears second hand, rather than directly, are accorded less weight and importance, and are deemed to have less oppressive impact than statements made directly to a plaintiff by a supervisor.

In light of *Black,* there now appears to be a clear conflict between the Sixth, Seventh and Tenth Circuits which have adopted a more restrictive view of sexual harassment and the Second, Eighth and Ninth Circuits which, given a similar factual scenario, would find the atmosphere sufficiently permeated with sexually hostile comments which would rise to the level of an objectively offensive work environment.

There is no clear indication coming out of the circuit courts as to when conduct is sufficiently *de minimis* to be non-actionable. The Sixth Circuit has now, like the Seventh and Tenth Circuit, carved out for employers a safe harbor for conduct which is merely "vulgar". This term, however, is highly ambiguous and provides insufficient guidance to the courts. If vulgarity refers to gender-neutral profanity or scatological comments that abusive foremen and supervisors direct toward all employees regardless of their gender, an argument can be made that such conduct does not come within the ambit of the conduct proscribed by Title VII, inasmuch as it is not designed to make the workplace uncomfortable for women as opposed to men. However, the Sixth, Seventh and Tenth Circuits, unlike the Second, Eighth and Ninth Circuits, would define vulgarity more broadly, including conduct of an admittedly gender-specific nature, as long as it merely reflects the popular culture of the day, permeated as it is with rude and explicit sexual references that many employees, especially female employees, find

offensive and degrading. The Sixth, Seventh and Tenth Circuits state rather clearly that, for better or worse, the workplace mirrors the coarser aspects of society, and that employees faced with such an environment must learn to cope with it as reflective of society in general. Such a workplace, while albeit offensive, is not *per se* objectively hostile.

The Tenth Circuit in *Gross v. Burggraf Construction Co.* attempts a finer distinction between a blue-collar work environment, where female employees are expected to tolerate a gender-hostile workplace environment because it is traditional to that industry, and a white-collar environment, where female employees reasonably have higher expectations.

Equally troubling is the Sixth Circuit's holding that sexually hostile comments merely made in the presence of a female employee are to be deemed less coercive, less hostile and less intimidating than comments made by supervisors directly to that plaintiff. (App. 10). In this regard *Black* goes even further than the Seventh Circuit in *Gleason*, which accorded such minimal weight only to sexually-specific comments which were made outside the plaintiff's presence, comments which she heard second-hand. Taken to its logical extension, *Black* creates a new widely expanded safe harbor for employer misconduct. There is nothing particularly benign about a sexually sensitive remark made by a group of male employees in the presence of a targeted female individual, especially when the remark is loud enough for the impacted female employee to hear. Indeed, it can be argued that such a remark is even *more* severe and humiliating than a remark made directly to such individual and that she is regarded

as having so little sensibility and feeling, or even so little identity, that it can be made with impunity in her presence. Equally as important, if *Black* is allowed to stand, it will have an equally devastating impact upon minority employees such as African-Americans and Hispanics who are also oftentimes the victim of hostile work environments. Racially, religiously, or sexually offensive drawings, cartoons, calendars and open recitation of jokes hitherto regarded as a hallmark of an unlawfully hostile work environment will now be deemed acceptable since they are not directed "at" a particular employee but merely displayed "in the presence" of such employee. Other circuits, particularly the Second, Eighth and Ninth Circuits, would not shrink from finding unlawful such offensive comments where they are directed at women because they are women and are not directed to males in the workplace. However, newly-created dichotomy created by the Sixth Circuit, i.e. whether a comment is made "to" a female employee as opposed to "in her presence", would appear to take the law in an entirely different direction.

Finally, whether sexually hostile comments are made "to" a female employee as opposed to "in her presence" is not one of the criteria set forth by the Supreme Court in either *Meritor* or *Harris*. Thus, by creating this distinction, the Sixth Circuit, along with the Seventh Circuit, would engraft upon *Harris* a new criterion for courts to consider in determining whether or not a sexually hostile environment exists.

To be sure, verbal abuse of the kind present in this and the other cases cited herein is, relatively speaking, not the most aggravated form of sexual harassment.

However, as this Court noted in *Harris*, the most egregious examples of harassment "do not mark the boundary of what is actionable". *Harris* at 22. It also bears emphasizing that verbal harassment, especially when participated in and condoned by top levels of management, as was the case here, may embolden the victim's co-workers to elevate their misconduct to the next level.

It has been almost five years since the Supreme Court in *Harris*, issued a significant opinion discussing the contours of Title VII in the context of what constitutes an unlawful sexually hostile work environment. It is beyond dispute that there should be a "safe harbor" where management's participation in or condonation of harassing conduct should be outside the scrutiny of federal courts. However, there has developed, since *Harris*, a wide divergence among the circuits as to how wide and deep that harbor should be. *Black* presents the ideal vehicle for the United States Supreme Court to clarify the law on this issue.

2. WHERE A TITLE VII PLAINTIFF HAS ADDUCED EVIDENCE AT TRIAL THAT SEVERAL GENDER-BASED HOSTILE REMARKS WERE DIRECTED TO HER BY VARIOUS MEMBERS OF THE ALL-MALE SUPERVISORY HIERARCHY OF HER EMPLOYER, INCLUDING ITS PRESIDENT, AND THE PLAINTIFF'S COMPLAINT TO THE EMPLOYER'S GENERAL COUNSEL ABOUT THE HARASSMENT WAS IGNORED, TO WHAT EXTENT MAY THE REVIEWING COURT SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF A JURY AND SET ASIDE A JURY VERDICT TO THE EFFECT THAT THE EMPLOYER'S CONDUCT TOWARD PLAINTIFF WAS SUFFICIENTLY SEVERE AND PERVASIVE SO AS TO CREATE AN OBJECTIVELY HOSTILE WORK ENVIRONMENT?

It is well-established in federal jurisprudence that a court of appeals may not set aside the verdict of a jury, or the finding of a judge sitting as a trier of fact, unless it is clearly erroneous or non-plausible. *U.S. v. U.S. Gypsum Co.*, 33 U.S. 364, 365, 68 S. Ct. 525 (1948). Fed. R. Civ. P. 52(a). A reviewing court cannot reverse a finding "of a trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573, 105 S. Ct. 1504 (1985). Nor is it proper for a reviewing court to undertake a *de novo* weighing of the evidence in the record. *Id.* at 576.

Whether or not a plaintiff meets the criteria set out by the Supreme Court in *Harris* to establish the existence of an objectively hostile work environment would appear a question ideally suited for a trier of fact. Questions as to

whether the sexual harassment complained of was sufficiently frequent, severe, and capable of interfering with the employee's ability to do her job are uniquely fact-specific. So are collateral issues such as the extent to which the employee found the work atmosphere subjectively offensive, and the extent to which the employer was put on sufficient notice of the harassment but took inadequate steps to cure it.

This policy of judicial deference has been adhered to in the context of Title VII sexual harassment cases in a number of federal circuits. In *Smith v. St. Louis University, supra,* the Eighth Circuit, in addressing the issue of the degree of hostility of the work environment, stated:

> Here, many of Schweiss's comments included gender conscious terms, and therefore could reasonably be believed to have been directed at Smith because of her sex. The question that remains is whether the abuse rose to the level required by *Harris* to be actionable under Title VII, *a question that a jury should resolve.*

Smith at 1265, (emphasis added). See also *Kimzey v. Wal-Mart Stores,* 107 F.3d 568 (8th Cir. 1997).

The Second Circuit has weighed in with similar sentiments. In *Torres v. Pisano, supra,* the Court held that even when the plaintiff may have a difficult time convincing a jury that her workplace was sufficiently hostile, the case should still go to the jury:

> She may find it difficult to convince a jury that pervasive harassment in fact took place, and that a reasonable employee in her shoes would have found her working environment hostile. But this court cannot say *as a matter of law* that

> Coe's alleged conduct did not suffice to create a hostile work environment. . . . [T]he pervasiveness of harassing conduct "is the sort of issue that *is often not susceptible of summary resolution*" [citing *DiLaurenzio v. Atlantic Paratrans, Inc.*, 926 F.Supp. 310, 314 (E.D. NY 1996).]

Torres at *14, (emphasis added).

The key role of a jury in sifting through all of the evidence to determine the impact of hostile and offensive statements (albeit in a racial rather than a sexual context) was recognized by the Third Circuit as well in *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-1084 (3rd Cir. 1996).

Whether these cases present themselves in the posture of review of a lower court's ruling on summary judgment or in the posture of review of a jury verdict is merely two sides of the same coin. Weighing all of the evidence to determine whether the *Harris* criteria have been met is the exclusive province of the trier of fact, as long as the plaintiff has posited before the court *some* evidence of gender-(or race-)specific hostility. Such issues should not be resolved as a matter of law.

Other circuits have taken a more activist role, and decided as a matter of law that certain patterns of employer conduct and certain levels of workplace hostility do not, as a matter of law, rise to the level of an actionable hostile working environment, notwithstanding the fact that a jury found that plaintiff introduced into evidence numerous instances of gender-specific harassment so as to support a verdict in her favor. As noted above, the Seventh Circuit, in *Baskerville, supra*, set aside a jury verdict in favor of plaintiff, even though she had

adduced several incidents of sexually insulting remarks by her supervisor. The Court ruled as a matter of law, that since the tenor of the remarks was no more egregious than those which were prevalent in the popular culture, no jury could reasonably find that plaintiff's workplace was unlawfully hostile.

A similar stance was taken by the Fourth Circuit in *Spicer v. Commonwealth of Virginia*, 66 F.3d 705 (4th Cir. 1995). At issue in *Spicer* was the adequacy of the employer's response to plaintiff's allegations of on-the-job sexual harassment. Notwithstanding the trier of fact's finding that the response was inadequate and that plaintiff has successfully established an objectively hostile work environment, the Fourth Circuit reversed the trier of fact and ruled as a matter of law that the employer had effectively responded to plaintiff's allegations. *Id.* at 705. The Court's ruling sparked a dissenting opinion to the effect that the adequacy of an employer's attempts to remedy sexual harassment is quintessentially a question of fact for the jury (or lower court sitting as a trier of fact) to resolve. *Id.* at 712.

A jury verdict was also preempted by the Fifth Circuit in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997). The issue in that case was whether plaintiff had made out a case of retaliation for her earlier filing of a sex harassment complaint. There was substantial evidence of on-the-job harassment which would support a jury verdict of retaliation. However, the Fifth Circuit ruled that this harassment was insufficiently attributable to the employer so as to hold it liable for the retaliation. *Id.* at 706-708. Again, there was a strong dissent taking the

majority to task for overturning a jury verdict on this highly fact-specific issue. *Id.* at 712-714.

In the case *sub judice*, the Sixth Circuit appears to have adopted the philosophy of judicial activism displayed by the Fourth, Fifth, and Seventh Circuits, in *Spicer, Mattern*, and *Baskerville*, rather than the policy of judicial restraint and deference displayed by the Second, Third, and Eighth Circuits in *Torres, Aman, Smith*, and *Kimzey*. Notwithstanding the fact that the jury in *Black* had substantial evidence before it in terms of the number and frequency of gender-hostile remarks made to the plaintiff by members of management, and the emotional distress she suffered therefrom, the Sixth Circuit, with very little factual analysis, concluded on its own that no trier of fact could reasonably conclude that the work environment was anything more than merely offensive. The only empirical evidence cited by the Court was that much of the harassing statements were, in its view, merely made in Petitioner's presence, rather than directly to her.

This case would not be particularly noteworthy were the extent of gender hostility before the jury truly *de minimis*, i.e., "a mere offensive utterance", *Harris* at 23. However, this case did not involve just one, or even just two or three isolated statements. The jury in *Black* was presented with a quantum of evidence equal to, or greater than, that existing in those other verbal sexual harassment cases where the reviewing court had no problem either sustaining jury verdicts or allowing the cases to go to the jury. See *Smith, Kimzey, Aman*, and *Torres, supra*. It also bears emphasizing that in *Black*, the jury was confronted with a female subject to gender-based insults and

ridicule by various levels of management, including the Company President, in an all male working environment. Furthermore, the jury had before it clear evidence that Respondent's Vice President and General Counsel had been put on notice of Petitioner's complaints of sexual harassment and yet did nothing about them.

There is, therefore, a sharp and significant dispute among the circuit courts as to the fact-specific nature of the various *Harris* factors for determining employer liability in a Title VII lawsuit for sexual harassment. The extent to which circuit courts are allowed to exercise free reign to invade the province of juries and second-guess their weighing and analysis of evidence in hostile work environment cases will govern the willingness of employees to bring their lawsuits in the first place. *Harris* created a fairly workable analytical framework for assessing the viability of a sexual harassment suit. If there existed sufficient facts whereby a jury might conclude that the *Harris* criteria had been met, the suit could go forward. However, if employees know that after the hard-fought battle has been won the reviewing court may on its own whim set aside the jury's finding, a chilling air of uncertainty will be injected into the process, and employees will be hesitant to bring such suits in the future.

Therefore, the Supreme Court should grant certiorari so as to resolve the dispute amongst the circuits on this significant issue.

CONCLUSION

For all of the reasons set forth, Petitioner respectfully asks that the within Petition For Writ Of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

DONALD B. HORDES

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0014P (6th Cir.)
File Name: 97a0014p.06

No. 96-3118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBRA BLACK,	)	ON APPEAL from the
Plaintiff-Appellee,	)	United States District
	)	Court for the Southern
v.	)	District of Ohio
ZARING HOMES, INC.,	)	
	)	
Defendant-Appellant.	)	

Decided and Filed Jan. 14, 1997.

Before: KENNEDY and BATCHELDER, Circuit Judges; EDGAR*, District Judge.

KENNEDY, Circuit Judge.

In this action under Title VII, 42 U.S.C. § 2000e *et seq.*, defendant appeals both the jury's verdict in favor of plaintiff and the magistrate judge's denial of its post-trial motion for judgment as a matter of law or, in the alternative, for a partial new trial or remittitur. The jury found that while plaintiff was an employee of defendant, she

* The Honorable R. Allan Edgar, United States District Judge for the Eastern District of Tennessee, sitting by designation.

was subjected to sexual harassment in the form of a hostile work environment. The jury awarded plaintiff $50,000 in compensatory damages and $200,000 in punitive damages. Defendant first argues that it is entitled to judgment as a matter of law because no reasonable interpretation of the evidence supports a finding of a hostile work environment. In the alternative, defendant asserts that (1) no justification exists for an award of punitive damages and (2) the magistrate judge erred in denying its motion for a new trial.[1] For the following reasons, we REVERSE.

I. Facts

Defendant is in the business of acquiring and developing land and building and selling homes. Plaintiff started working for defendant as Land Acquisition Manager on June 29, 1993. Her job entailed identifying pieces of land suitable for neighborhood development and working toward getting that land under contract to purchase. Her duties required that she be out of the office and in the field seventy percent of the time.

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[1] Defendant sought a new trial on grounds that the magistrate judge erred in admitting certain evidence, including, as evidence of a hostile work environment, evidence of two incidents that occurred after plaintiff left defendant's employ and which did not involve plaintiff. Defendant also asserted that the jury instructions were improper and inaccurate. Defendant has raised substantial claims with regard to these assignments of error, but we decide the case on other grounds.

Every two weeks, employees of defendant's land department attended "land meetings" to discuss the status of acquisition efforts. Besides plaintiff, attendees included Jeff Hebeler, plaintiff's immediate supervisor; Ronald Benkert, defendant's then-President; Michelle Grigsby, Vice President and in-house General Counsel; Tim Zaring, Rick Iannitti, Tim Kramer, and Doug Hinger, the managers in charge of defendant's four product lines of homes; Jeff Hafer, development manager; and Mark Stenger, land development administration manager. Plaintiff asserts that sexually harassing comments were made at many of these meetings.

Sometime at the end of July, plaintiff was in a land meeting, sitting next to Tim Zaring. Zaring reached over to take a pastry from a plate in the center of the table and in front of plaintiff, and he said, "Nothing I like more in the morning than sticky buns," while looking plaintiff up and down, smiling, and "wriggl[ing]" his eyebrows. Plaintiff asserts that she reacted by saying "Tim, cut it out," whereafter Zaring turned to Iannitti, who was sitting on his other side, and laughed. Zaring's comment "bothered [plaintiff] a little bit."

At the next land meeting, sometime in mid-August, the meeting participants discussed a parcel of land adjacent to a Hooters Restaurant. Someone suggested that the area be named "Hootersville," and Zaring and Iannitti suggested "Titsville" or "Twin Peaks." Everyone at the meeting laughed. Plaintiff says she "looked down, and . . . was devastated by this thinking this is going to continue on . . . an ongoing basis." According to plaintiff, jokes about this particular parcel of land occurred at numerous meetings. Her ability to work was affected

because she would worry that any remark she might make would "throw everybody off for awhile."

Also in August, plaintiff went to Hebeler to discuss her job performance and to ask about how her bonus would be affected by the number of parcels of land she acquired. Hebeler responded by telling plaintiff that she was "paid great money for a woman." Plaintiff was "deeply upset" about the comment.

In September, plaintiff was negotiating to purchase a parcel of land owned by an individual named "Dr. Paul Busam," apparently pronounced "bosom." Plaintiff gave a presentation regarding the parcel at a land meeting and, when she mentioned the owner's name, everyone laughed. Some participants, although plaintiff could only specifically name Iannitti, began joking again about the possible names for the property near the Hooters Restaurant. In order to avoid such laughter and joking at subsequent meetings, plaintiff would refer to the owner as "Dr. Paul."

At a land meeting in October, when plaintiff asked about the location of a particular property, Benkert told her that it was near a biker bar. He then said, "Say, weren't you there Saturday night dancing on the tables?" Plaintiff testified that everyone laughed and that she was "hurt," "crushed," and "devastated" by the remark because "it was making a characterization of [her]." After the remark, plaintiff looked down and quietly said, "Not hardly, Ron," but she did not believe that anyone heard her.

Finally, sometime in October, plaintiff was sitting next to Hebeler, waiting for a land meeting to start, when

she heard him tell Hafer, "Just get the broad to sign it." This comment was made supposedly in response to Hafer telling Hebeler that he was having problems getting a county official to sign a document. Plaintiff says that she immediately looked at Hebeler and that he looked at her and shrugged his shoulders. She then shook her head.[2]

Plaintiff testified that she complained to Michelle Grigsby, defendant's general counsel, sometime at the end of the summer. Their discussion took place in the women's restroom after a land meeting. Plaintiff says she told Grigsby: "I can't stand this in this land meeting. This is crazy. It's gotten way out of hand. Has it always been like this?" Grigsby responded: "Well, that's just the way they are. . . . There's nothing you can do about it." Plaintiff then said: "Except that it takes up so much time. It doesn't make sense to spend quality business time to get our business done for them to go off on these little tangents and little schoolboy activities laughing and joking."

Plaintiff was terminated for performance deficiencies on November 8, 1993, a little over four months after she

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[2] Defendant includes in its list of alleged incidents of harassment an event that occurred in mid-August at a farewell party for an employee of defendant: Allen Zaring, defendant's chief executive officer, invited plaintiff and Michelle Grigsby to sit by him, saying "I love to be surrounded by beautiful women." Plaintiff says she was not offended by this remark, but that she was offended by the "look" she received from an unidentified woman. Plaintiff does not include this event in her brief. The magistrate judge found that "this isolated incident did not constitute, nor did it contribute to a sexually hostile and abusive environment."

started working for defendant. On April 4, 1994, she filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC). Plaintiff received a right to sue notice on or about June 9, 1994. She then sued defendant alleging sex discrimination, sexual harassment, breach of contract, and the intentional infliction of emotional distress. She asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as claims under the comparable state statute, OHIO REV. CODE § 4112.02(A) (Anderson 1991), and Ohio common law. The parties agreed to have the case tried by a magistrate judge. Plaintiff dismissed the breach of contract claim, and the magistrate judge directed a verdict in defendant's favor on plaintiff's emotional distress claim.

On March 31, 1995, the jury rendered a verdict against plaintiff on her claim of sex discrimination related to her termination, but in favor of plaintiff on her claim of sexual harassment based on a hostile work environment. The jury awarded $50,000 in compensatory damages and $200,000 in punitive damages. Judgment on this verdict was entered on September 21, 1995.

Defendant timely filed a renewed motion for judgment as a matter of law or, in the alternative, for a partial new trial on the sexual harassment claim or remittitur. The magistrate judge denied defendant's motions. The magistrate judge found that the evidence revealed "an atmosphere of a grade school level fascination with women's body parts combined within [sic] denigrating comments about women" which were "not appropriate in the workplace." Acknowledging that "[t]he more difficult question is whether this conduct was sufficiently offensive and occurred often enough to create an objectively

and subjectively hostile and abusive working environment," the magistrate judge held that the evidence supported such a finding.

The magistrate judge also denied defendant's motion for a new trial, finding that (1) the verdict was not against the clear weight of the evidence; (2) its evidentiary rulings were not prejudicial to defendant; (3) the jury instructions were not misleading, inadequate, or prejudicial; and (4) the verdict did not shock the conscience. Finally, stating that the "propriety of a punitive damages award in this case is a close question," because plaintiff did not complain about many of the comments, the magistrate judge concluded that the jury could have determined that particular circumstances demonstrated reckless disregard for women's rights in general and plaintiff's rights in particular. Accordingly, the magistrate judge affirmed the judgment.

This timely appeal followed.

II. Discussion

A.

This Court's standard of review for a FED.R.CIV.P. 50(b) motion for judgment as a matter of law based on the sufficiency of the evidence is identical to that used by the District Court. *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir.1996). Thus, we do not weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury. *Id.* at 175-76; *Wehr v. Ryan's Family Steak Houses, Inc.*, 49 F.3d 1150, 1152 (6th Cir.1995). Instead, we must view the evidence in the light

most favorable to the party against whom the motion was made, and give that party the benefit of all reasonable inferences. *K & T Enters., Inc.*, 97 F.3d at 176. We reverse a district court's denial of such a motion only if reasonable minds could not come to a conclusion other than one in favor of the movant. *Id.*

B.

Title VII of the Civil Rights Act of 1964 prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment. Indeed, the statute grants employees "the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65.

However, the Court emphasized in *Meritor* that not all workplace conduct that has sexual overtones can be characterized as harassment forbidden by the statute. *See id.* at 67. Rather, harassment must affect a "term, condition, or privilege" of employment in order for it to fall within Title VII's purview. Thus, for alleged harassment to be actionable, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir.1982)).

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993), the Supreme Court reaffirmed this standard and elaborated upon its contours. The *Harris* Court explained that the conduct in question must be judged by both an objective and a subjective standard: The conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive. *Id.* at 21-22. "This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* at 21. Acknowledging that this approach is not susceptible to a "mathematically precise test," *id.* at 22, the Court then sought to provide some guidance with regard to the somewhat elusive question of whether a work environment was objectively hostile or abusive. The Court explained that all of the circumstances should be considered, and it suggested a non-exhaustive list of relevant factors:

> [T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 23.

Defendant concedes that verbal conduct alone can be the basis of a successful hostile work environment claim.

However, it asserts that such conduct must be objectively hostile or abusive before it can be legally proscribed. Defendant maintains that here the verbal conduct simply did not rise to that level and that therefore the evidence does not support a finding of sexual harassment.

We agree with defendant. Given the imprecise standard laid down by the *Harris* Court, we might be reluctant to overturn a jury verdict in favor of plaintiff. Nevertheless, although the comments were sex-based, we hold that the evidence is insufficient to support a finding that they were severe or pervasive enough to create an objectively hostile work environment.[3] Our conclusion is not based upon an analysis of the comments as isolated events. Rather, viewing the totality of the circumstances, *see Harris*, 510 U.S. at 23, we find that even when construed in a light most favorable to the plaintiff, the conduct does not appear to have been more than "merely offensive," *id.* at 21. While we emphasize that sex-based comments need not be directed at a plaintiff in order to constitute conduct violating Title VII, we note that in this case most of the comments were not directed at plaintiff; this fact contributes to our conclusion that the conduct here was not severe enough to create an objectively hostile environment. *See cf. Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 541 (1st Cir.1995) (finding that plaintiffs' allegations were not so severe as to create an objectively hostile educational environment under

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[3] Indeed, the magistrate judge commented that it "recall[ed] very few sexual harassment cases tried in this court or in the case books where the conduct was that innocuous as in this case."

Title IX, in part because the sexual comments were not directed at the plaintiffs), *cert. denied,* 116 S.Ct. 1044 (1996). Although the verbal comments were offensive and inappropriate, and the record suggests that defendant's employees did not always conduct themselves in a professional manner, Title VII was "not designed to purge the workplace of vulgarity," *Baskerville v. Culligan Int'l Co.,* 50 F.3d 428, 430 (7th Cir.1995).

Although the EEOC in its amicus brief urges us to reject the court's analysis in *Baskerville,* we find that case helpful. In *Baskerville,* the Seventh Circuit overturned a jury verdict in favor of the plaintiff because it found that the facts were insufficient to support a finding of an objectively hostile work environment. *Id.* at 430. As in this case, the plaintiff's claim was based on verbal conduct only.[4] The court found that the nine allegedly

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[4] The plaintiff testified that over a period of seven months, her supervisor: (1) would call her "pretty girl"; (2) once made a grunting sound when she was wearing a leather skirt; (3) in response to her comment that it was hot in his office, said "Not until you stepped your foot in here"; (4) once, when an announcement "May I have your attention, please," was broadcasted over the public address system, said to plaintiff, "You know what that means, don't you? All pretty girls run around naked"; (5) called plaintiff a "tilly," explaining that he used that term for all women; (6) once told her that his wife had told him he had "better clean up my act" and "better think of [plaintiff] as Ms. Anita Hill"; (7) when asked why he had left the office holiday party early, replied that there were so many pretty girls there that he "didn't want to lose control, so I thought I'd better leave"; (8) once replied, after plaintiff commented that his office was smokey, "Oh really? Were we dancing, like in a nightclub?"; and (9) once made a movement suggesting masturbation in response to the plaintiff's question regarding

unlawful incidents, spread over seven months, could not reasonably be thought to constitute sexual harassment actionable under Title VII. *Id.* The court reached this conclusion not because the alleged harassment was based upon verbal conduct only, but because the conduct did not create an objectively hostile work environment.

The EEOC maintains that *Baskerville* improperly ignored the impact that offensive comments have in the context of the workplace, and that we should instead follow the reasoning of *Harris*. Yet, we do not believe that *Baskerville* is inconsistent with *Harris* or *Meritor*. The Supreme Court in both decisions recognized that there may be times when offensive comments have an impact in the workplace, indeed constitute "harassment", but do not create an objectively hostile work environment. *See Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 67. "[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor*, 477 U.S. at 67. Our understanding of the analysis in *Meritor* and the standard set forth in *Harris* supports our finding that the record here does not establish an objectively hostile work environment. Accordingly, the verdict must be reversed.

III. Conclusion

For the foregoing reasons, we REVERSE.

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whether he had bought his wife a Valentine's Day card. *Baskerville*, 50 F.3d at 430.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEBRA BLACK,

Plaintiff

vs

Case No. C-1-94-471

ZARING HOMES, INC.,

Defendant

ORDER

(Filed Dec. 27, 1995)

This case is before the Court on defendant Zaring Homes, Inc.'s renewed motion for judgment as a matter of law or, in the alternative, for a partial new trial or remittitur (Doc. 64), plaintiff Debra Black's response (Doc. 65), and defendant's reply (Doc. 66). Black sued Zaring Homes alleging sex discrimination and hostile environment sexual harassment claims pursuant to Title VII of the Civil Rights Act of 1964 as amended, 28 U.S.C. § 2000e et. seq. and the comparable state statutes, Ohio Rev. Code § 4112.02(A) et. seq. The jury trial on these claims resulted in a finding that Zaring Homes did not discriminate against Black due to her gender when it discharged her. The jury found, however, that Black was subjected to sexual harassment, and it awarded her

$50,000 in compensatory damages and $200,000 in punitive damages. (Doc. 63). The Court subsequently awarded Black attorneys' fees and costs. *Id.*

Zaring Homes moves for judgment as a matter of law regarding plaintiff's sexual harassment claim. In the alternative, it requests a new trial on the sexual harassment claim or a remittitur of compensatory and punitive damages.

THE STANDARD OF REVIEW

Pursuant to a Rule 50(b) motion for judgment as a matter of law, the Court may set aside the jury's verdict and enter a judgment as a matter of law only if reasonable minds could come to but one conclusion from the evidence. *Wayne v. Village of Sebring*, 36 F.3d 517, 525 (6th Cir. 1994); *Radliff v. Wellington Exempted Village Schools Bd. of Ed.*, 820 F.2d 792, 795 (6th Cir. 1987). Reviewing the evidence as it existed at the close of trial, *see Douglass v. Eaton Corp.*, 956 F.2d 1339, 1344 (6th Cir. 1992), the court must construe all evidence in favor of the party prevailing at trial, drawing all reasonable inferences in the prevailing party's favor. *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). The court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. *Agristor Leasing v. A.O. Smith Harvestore Products, Inc.*, 869 F.2d 264, 268 (6th Cir. 1989). If there is substantial evidence from which the jury could find in favor of the party against whom the motion is made, the motion must be denied. *Lewis v. City of Irvine, Kentucky*, 899 F.2d 451, 454 (6th Cir. 1990).

The authority to grant a Rule 59(a) motion for a new trial is purely within the Court's discretion. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989). The bases for granting a new trial include findings that the verdict was against the clear weight of the evidence, *Hartzler v. Licking Cty. Humane Society*, 740 F. Supp. 470, 480 (S.D. Ohio 1990), the jury instructions were misleading, inadequate, or prejudicial, *Fryman v. Federal Crop Ins. Corp.*, 936 F.2d 244, 248 (6th Cir. 1991), or attorney misconduct resulted in prejudice. *Clarksville-Montgomery County School System v. U.S. Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991).

When ruling on a motion for a new trial because the verdict is against the weight of the evidence, the court may set aside the verdict only if it determines that it is against the clear weight of the evidence. *Simpson v. White*, 52 F.3d 326 (6th Cir. 1995). "[The court] is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because [the court] feel[s] that other results are more reasonable." *Hartzler*, 740 F. Supp. at 780 (quoting *Duncan v. Duncan*, 377 F.2d 49, 52 (6th Cir. 1967)); *U.S. v. L.E. Cooke Co. Inc.*, 991 F.2d 336, 343 (6th Cir. 1993).

Rule 59 allows for a remittitur as an alternative to a new trial only when, after reviewing all evidence in the light most favorable to the prevailing party, the court is convinced that the verdict is clearly excessive, resulted from passion, bias, or prejudice, or is so excessive or inadequate as to shock the conscience. *Farber v. Massillon Bd. of Ed.*, 917 F.2d 1391, 1395 (6th Cir. 1990). While the grant of a remittitur is within the court's discretion, it

abuses its discretion in ordering either a remittitur or a new trial when the award turns upon conflicting evidence and the credibility of witnesses. *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984). *See also Cross v. Thompson*, 298 F.2d 186 (6th Cir. 1962). If there is credible evidence to support the verdict it should not be set aside. *Farber*, 917 F.2d at 1395; *Werthan Bag Co. v. Agnew*, 202 F.2d 119 (6th Cir. 1953). "As a general rule, . . . a jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Green v. Francis*, 705 F.2d 846, 850 (6th Cir. 1983). *See also In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988). If the trial court reduces the award, it must offer the prevailing party a choice between a new trial and the amount of its remittitur. *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 976 (6th Cir. 1974).

ZARING HOMES IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

Zaring Homes seeks judgment in its favor as a matter of law because it contends the evidence is not sufficient to support a finding of hostile environment sexual harassment. It claims that the alleged wrongful conduct did not create an environment that either a reasonable person or plaintiff herself would find hostile or abusive. It also avers that the punitive damages award should be set aside because the Court should not have given a punitive damages charge and because the jury's award of punitive damages was unreasonable.

Title VII is violated when an employee is subjected to harassment because of her sex that is sufficiently pervasive to alter her employment conditions and create an abusive or hostile working environment. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370-71 (1993). The harassment must be severe or pervasive enough to create an environment that is both objectively hostile or abusive as well as one that plaintiff herself perceives as hostile or abusive. *Id.* at 370; *Goldsmith v. City of Canton*, 47 F.3d 1168 (6th Cir. 1995). There is no specific test for detecting hostile environment sexual harassment. The trier of fact must look at all the circumstances. *Id.* at 371. These circumstances include, but are not limited to: (1) the frequency of the wrongful conduct; (2) its severity; (3) whether the conduct was physically threatening, humiliating or a mere offensive utterance; (4) whether the conduct unreasonably interfered with plaintiff's work performance; and (5) the conduct's effect on the plaintiff's psychological well-being. *Harris*, 114 S. Ct. at 371. The court may consider the psychological effects on plaintiff even though a tangible psychological injury is not proven. *Id.* These factors do not comprise the sole test for sexual harassment; the jury must evaluate all the circumstances to decide whether sexual harassment occurred. *Id. See also Id.* at 372 (Ginsburg, J. concurring) and id. (Scalia, J. concurring).

The mere utterance of an epithet that engenders offensive feelings in an employee does not sufficiently affect employment conditions to violate Title VII. *Id.* at 369-70. However, recovery for hostile environment sexual harassment can be based on offensive utterances alone. *See Harris v. Forklift Systems, Inc.*, 1994 WL 792661 (M.D. Tenn. Nov. 9, 1994); *Dillon v. Frank*, 952 F.2d 403 (6th Cir.

1992); *Shope v. Bd. of Supervisors of Louden County, Va.*, 14 F.3d 596 (4th Cir. 1993). A plaintiff may prove interference with her work performance by showing that a reasonable person subjected to the conduct in question, as well as the plaintiff herself, would find that it altered her working conditions by making it more difficult to perform her job. *Harris*, 114 S.Ct. at 372 (Ginsburg, J. concurring) (referring to *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 349 (6th Cir. 1988)).

In the instant case, the jury found that Zaring Homes' discharge of Black was not the result of gender discrimination. This finding indicates the jury's determination that Zaring Homes' Chief Executive Officer Allen G. Zaring, did not engage in discriminatory conduct. Nor did Black establish that Allen G. Zaring engaged in sexual harassment.[1] She claimed that other Zaring Homes personnel made offensive utterances to her during a four month period, thus creating a hostile working environment. She alleged that Land Acquisitions Director Jeff Hebeler (Black's immediate supervisor), General Counsel

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[1] The only incident Black related involving Allen Zaring took place when Black and General Counsel Grigsby arrived together at a company employee's farewell party. Allen Zaring asked them to sit on either side of his chair and said, "I love to be surrounded by beautiful women." (Doc. 50, Tr. 276). Black walked over and stood on one side of Zaring while Grigsby stood on the other. Black was not offended by the compliment, but said she was offended by the reaction of her female coworkers. She believed that it gave them the impression that she "was his little play toy" and raised questions concerning the reasons she had been hired. (Doc. 50, Tr. p. 277). We find this isolated incident did not constitute, nor did it contribute to a sexually hostile and abusive environment.

Michelle Grigsby, and President Ron Benkert either participated in or were aware of such conduct and did nothing to prevent it. To decide the pending motions, we must assume that the jury found Black's version of the events regarding sexual harassment credible. *Chappell,* 803 F.2d at 265, *Hartzler,* 740 F. Supp. at 780.

The first incident occurred at a land acquisition meeting. The Estate Division Product Manager, Tim Zaring, reached across the table in front of Black for a donut. He said to her while wiggling his eyebrows, "nothing I like more in the morning than sticky buns." (Tr. pp. 255-57). Black looked down and said, "Tim, cut it out." (Id.). He then leaned toward Rick Iannitti and the two men started whispering and laughing (Id.).

Another incident occurred at a land acquisition meeting involving the purchase of a property near a "Hooters" restaurant. Employees Tim Zaring and Rick Iannitti suggested names for the property such as "Hootersville," "Titsville," and "Twin Peaks." (Id. 259-60). Black was present at this meeting. These suggestions were met with much laughter by all the men at the meeting, and the meeting was interrupted for a time until the laughter ceased. (Id., 260-61).

The next incident arose at a land acquisition meeting involving a prospective land seller named Busam. The men at the meeting broke into uncontrollable laughter at the name, which was pronounced "bosom." (Id., p. 268). Black was present at this meeting. This incident precipitated a reference to the Hooters restaurant discussion and triggered more laughter among the men at the meeting. Both of these discussions were revisited at subsequent

meetings whenever the name Busam was mentioned and the men at the meetings had similar reactions each time. (Id. 268-69). Black had to cease using the client's name to avoid outbursts at other meetings. (Id. 169-70).

One incident occurred at a land acquisition meeting involving a discussion of certain property Zaring Homes was considering purchasing. (Id., 264). When Black asked where the property was located, President Ron Benkert described its location as "on old 74 close to the gun and ammo (sic) place. There's a biker bar (sic) right next door to it." (Id., 265). Then Benkert asked Black, "[s]ay, weren't you there Saturday night dancing on the tables?" (Id.). Benkert's question was met with laughter from those at the meeting. (Id.). Black looked down and responded, "not hardly, Ron." (Id., 266).

Another incident took place when Black was sitting next to her supervisor, Jeff Hebeler, waiting for the start of a land acquisition meeting. (Id., 271). An assistant approached Hebeler to discuss a problem regarding having a permit signed. Black overheard Hebeler tell his assistant, "[j]ust get the broad to sign it." (Id.). Black immediately looked at Hebeler and he shrugged his shoulders. Black shook her head and put it down. (Id., 271-72).

An incident happened when Black approached Hebeler to discuss her performance and the company's salary bonus plan. (Id., 273). Black asked Hebeler whether she would receive a salary bonus for property she found over her minimum and he responded, "[y]ou are paid great money for a woman. Your job is to find

ground. . . . Don't worry about your income. You just do what I tell you and get your job done." (Id., 274).

Zaring Homes argues that the aforesaid remarks, uttered over a four month period, were neither offensive nor sufficiently pervasive to establish sexual harassment. It contends that the statements were nothing more than "remarks of a schoolboy kind" (Doc. 64, p. 12), and "spontaneous jokes precipitated by circumstance." (Id., 5). It argues that "there is no workplace in the world where a joke [regarding women's breasts] inspired by [the] restaurant [Hooters] name and ambience would not have occurred in the context of suggesting a name for a potential . . . neighborhood. . . . " (Id.). It claims that requiring its employees not to interrupt a meeting with uncontrollable laughter at the name Busam does not promote Title VII's goals of equal opportunity in the workplace. (Id.).

Zaring Homes contends that Tim Zaring's comment in Black's presence, "there's nothing I like more in the morning than sticky buns," was merely "an off-the-cuff quip inspired by his liking for the . . . pastries served at the meeting." (Id., p. 5). It argues that because General Counsel Michelle Grigsby attended the land acquisition meetings and was not embarrassed or uncomfortable, these comments cannot be objectively construed as offensive. It also argues that plaintiff failed to prove she personally found these incidents to be abusive or hostile. It contends that when President Benkert asked Black if she danced on the table tops at a "biker bar," she was offended because she attributed an unintended negative implication to the statement. It asserts that Hebeler's remark about plaintiff making good money for a woman

was generated by his shock and surprise that Black would raise salary issues so soon after being hired.

While Zaring Homes views each incident separately and characterizes each as harmless, the jury properly viewed the circumstances collectively. The evidence revealed an atmosphere of a grade school level fascination for women's body parts combined within denigrating comments about women. There was no evidence of similar conduct regarding males. The jury found, and the Court agrees, that this conduct is not appropriate in the workplace. The jury found these remarks to be directed to either Debra Black or to women in general in Black's presence, and they found them offensive. They also found that Black personally found them offensive. The Court agrees with these findings.

Zaring Homes relies on the reactions of two of its female management members, General Counsel Grigsby and Operations Vice President Anna McCarthy, who were not offended by such conduct. It claims that if these two women were not offended, the conduct could not constitute sexual harassment. There is evidence, however, that McCarthy engaged in conduct offensive to women with Grigsby's approval. During the time Black was employed by Zaring Homes, McCarthy drafted a chart calendaring the menstrual cycles of female employees, and she posted the chart on Rick Iannitti's office door. Grigsby was aware of the chart and its posting but took no action to have it removed. Apparently, the two women found the chart to be humorous.

Zaring Homes claims that because McCarthy and Grigsby thought the chart was amusing, the incident did

not contribute to creating an abusive environment. The jury, however, apparently had no problem in finding this incident to be offensive to a reasonable employee. The Court agrees with the jury's determination. This evidence was admitted over objection as proof of management's disregard of sexually harassing conduct. The fact that the conduct was perpetrated and condoned by two female members of upper management does not bar recovery. Women can engage in sexual harassment toward other women. As managers responsible for eliminating such conduct, they can contribute toward an atmosphere that is abusive to women by ignoring their responsibility and condoning such conduct. *E.E.O.C. v. Hacienda Hotel,* 881 F.2d 1504, 1515 n. 8 (9th Cir. 1989); *Baskerville v. Culligan Int'l Co.,* 50 F.3d 428, 431 (7th Cir. 1995); *see also Dillon,* 1992 WL 5436, at *7.

There is substantial evidence from which a reasonable person could find that the challenged conduct was humiliating and offensive to women. There was no evidence of similar comments made about men. The jury reasonably concluded that the offending conduct was directed at Black because of her gender. The more difficult question is whether this conduct was sufficiently offensive and occurred often enough to create an objectively and subjectively hostile and abusive working environment.

Black testified she personally found the conduct in question to be abusive. She was employed by defendant for four months. Given the short duration of her employment, the frequency and severity of the remarks was not insignificant. Black testified that she was devastated by the comments about the property near Hooters restaurant

(Tr. p. 260), and felt crushed when President Ron Benkert asked her if she danced on table tops in a "biker bar." (Id., 265). She also testified that she was deeply upset by Hebeler's statement that she was "paid good money for a woman." (Id., 274). She testified that the incidents adversely affected her work performance (id., 260-61, 270), and psychological well-being (id., 280, 1452-54). Black received psychological treatment for adjustment disorder with anxiety and depression. (Id., 905). Dr. Baum, her psychologist, testified that the incidents in question, which were discussed as part of Black's treatment, contributed to her stress and anxiety. (Id., 912). The Court must assume that the jury found this testimony credible. *Chappell*, 803 F.2d at 265; *Hartzler*, 740 F. Supp. at 780.

The jury comprised five women and three men whose ages ranged from thirty-one to fifty-six years. The jurors listed their occupations as pipefitter, homemaker, printer, payroll supervisor, purchasing agent, health care worker, truck driver, and surgical secretary. These eight people were properly instructed on hostile environment sexual harassment and very carefully considered the facts necessary to render a decision on this difficult issue. They clearly believed that there existed an atmosphere hostile and abusive to women. They returned their verdict with a notation at the bottom of the verdict form recommending that Zaring Homes employees "undergo diversity/sexual harassment training."[2]

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[2] The Court was notified following trial that Zaring Homes voluntarily underwent a sensitivity training program and successfully completed it.

In deciding the instant motions, the Court may not weigh the evidence, pass on witness credibility, or substitute its judgment for that of the jury. Construing all the evidence and drawing all reasonable inferences in plaintiff's favor, there is sufficient evidence to support the jury's verdict. For the foregoing reasons, defendant's motion for judgment as a matter of law on plaintiff's hostile environment sexual harassment claim will be denied.

Zaring Homes' contention that the Court should not have instructed the jury on punitive damages is discussed *infra*, pp. 13-16.

ZARING HOMES IS NOT ENTITLED TO A NEW TRIAL

Zaring Homes contends that the Court should grant a new trial on plaintiff's hostile environment sexual harassment claim because: (1) the clear weight of the evidence fails to establish a hostile environment; (2) testimony was both improperly excluded and improperly admitted; (3) the jury was improperly instructed on sexual harassment; (4) the court should not have allowed the jury to consider punitive damages; (5) the punitive and compensatory damage awards are excessive; and, (6) the jury was unfairly influenced by plaintiff counsel's appeals to passion and prejudice. In the alternative, it argues the Court should reduce the amount of the compensatory and punitive damage awards.

For the reasons stated *supra*, pp. 4-10, the Court finds that the jury's verdict is not against the clear weight of the evidence. Reasonable jurors could find that the verbal

conduct was hostile and abusive toward women in general and Black in particular and constituted harassment based on sex. Although it is a closer question, reasonable jurors could also find that such conduct sufficiently permeated Black's work environment to alter her employment conditions and make it more difficult for her to perform her job. The Court may not grant a new trial merely because different conclusions or inferences can be drawn based on the evidence presented or because it believes that other conclusions are more reasonable. The five female and three male jurors were properly instructed, and, pursuant to the dictates of *Harris*, there is no reason to substitute a judge's opinion for theirs.

The Court admitted testimony regarding incidents not directly involving plaintiff that showed the company's tolerance of sexual harassment during pertinent periods. Testimony concerning the menstrual chart posting, for example, was relevant because Zaring Homes' Operations Vice President and General Counsel were aware of the incident, failed to act upon it, and in effect condoned it. An error in admitting or excluding evidence may not be grounds for granting a new trial unless the ruling was "inconsistent with substantial justice," *TCP Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 550 (6th Cir. 1981); or, in the case of excluded evidence, the evidence would have caused a different outcome, *Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522, 527 (6th Cir. 1993). The Court carefully considered its evidentiary rulings, heard challenged evidence outside the jury's presence, heard arguments on each issue, and evaluated all relevant factors before ruling. The Court admitted evidence of each party and rejected evidence of each party evenhandedly.

We see no bases to revisit each ruling in detail herein. The rulings did not improperly prejudice Zaring Homes.

Zaring Homes contends that the Court should have instructed the jury that among the circumstances they may consider were "the frequency of the discriminatory conduct; its severity; and *whether it is physically threatening or humiliating or a mere offensive utterance.*" The Court instructed the jury that "[s]exual harassment may include verbal or physical conduct of a sexual nature, or abusive or humiliating remarks based on Plaintiff's sex." (Tr. p. 2027). The Court also instructed the jury that it may consider the frequency of the harassing conduct and its severity, whether it unreasonably interfered with Plaintiff's work performance, and whether harassing comments were made by persons in a higher management position. (Id., 2028).

A party is not entitled to a new trial unless the jury instructions taken as a whole are misleading or give the jury an inadequate understanding of the law. *Bowman v. Koch Transfer Co.*, 862 F.2d 1257, 1263 (6th Cir. 1988); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 72-73 (6th Cir. 1990). Because the challenged conduct consisted entirely of offensive utterances, the requested instruction would have misled the jury by suggesting that a sexual harassment claim could not be based upon "mere" offensive utterances. The trier of fact must look at all the circumstances to decide whether a working environment is hostile or abusive. There is no definitive test. The jury must consider a variety of factors. *See Harris*, 114 S. Ct. at 371. The Court's hostile environment sexual harassment

instruction informed the jury of the relevant considerations and provided them with a proper basis in law for reaching a decision. *Beard*, 900 F.2d at 72.

Zaring Homes' contention that the Court should not have instructed the jury on punitive damages is discussed *infra*, pp. 13-16.

Zaring Homes contends that the compensatory and punitive damages awards are excessive and moves this Court for a new trial, or in the alternative, for a remittitur. The Court properly instructed the jury that it must determine what damages, if any, will be awarded to compensate plaintiff and that there is no exact standard for fixing the compensation awarded for the mental aspect of injury. The Court also instructed the jury that the punitive damages to be awarded, if any, must be determined based on all the evidence and that they may consider defendant's financial resources in deciding the amount. *Rodgers v. Fisher Body Division, GM Corp.*, 739 F.2d 1102, 1109 (6th Cir. 1984).

Excessiveness of a compensatory or punitive damage award is determined based upon "[w]hether [it] is so high as to shock the judicial conscience and constitute a denial of justice." *Id.* Neither damage award shocks the conscience. In 1994, Zaring Homes' assets totaled over forty million dollars and its earnings were over six million dollars. (Tr. p. 2102). Although the punitive damage award is four times the amount of compensatory damages, it appears the jury felt this was the minimum amount necessary to get the attention of a company with such assets and earnings. The jury's written comment on the verdict indicates that, in addition to compensating the

plaintiff, they wished to punish the defendant sufficiently to attract its attention to the need for sensitivity training. The Court abuses its discretion by granting a new trial or reducing an award when, as here, the verdict is based on witness credibility and conflicting evidence. *See Hewitt*, 732 F.2d at 1556. For the foregoing reasons, the award amounts will not be reduced.

Zaring Homes contends that plaintiff's counsel's conduct and alleged appeals to passion and prejudice unfairly influenced the jury and prejudiced the defendant, thereby requiring a new trial. To avoid prejudice to opposing counsel, the trial judge may interrupt counsel during argument and instruct the jury to disregard prejudicial statements. This Court does not hesitate to do so when necessary. The Court carefully scrutinized counsel's argument at the time of trial and did not find that the argument unfairly prejudiced defendant. The jury's verdict in Zaring Homes' favor regarding Black's discriminatory discharge claim shows that the jury was not unduly influenced by plaintiff's counsel's remarks.

The Court has reviewed the record as a whole and carefully considered defendant's arguments in support of its motion for a new trial. We find the verdict was not against the clear weight of the evidence, the jury instructions were not misleading, inadequate or prejudicial, and there was no prejudicial attorney misconduct. Nor is the verdict so excessive as to shock the conscience. Therefore, the motion for a new trial, or, in the alternative, for remittitur will be denied.

THE JURY'S PUNITIVE DAMAGES AWARD WILL NOT BE SET ASIDE

Zaring Homes contends that the jury should not have been instructed on punitive damages and that the evidence was not sufficient to support such an award. It moves the Court to set aside the punitive damages award.

The 1991 Civil Right [sic] Act amended Title VII to permit recovery of punitive damages where a plaintiff proves by a preponderance of the evidence that a defendant engaged in a discriminatory practice with malice or with reckless indifference to her federally protected rights. 42 U.S.C. § 1981a. *See also Hennessy v. Penril Datacomm Networks Inc.*, 1995 WL 671574, *6-7 (7th Cir. Nov. 13, 1995). A punitive damages award must be supported by the record and cannot constitute a windfall to the prevailing party. *Id.* at *7. *See also Nicks v. Missouri*, 67 F.3d 699 (8th Cir. 1995); *Turic v. Holland Hospitality, Inc.*, 849 F. Supp. 544 (W.D. Mich. 1994). A punitive damages award must bear a reasonable relationship to the amount of compensatory damages, but courts should not depend on a fixed mathematical formula in determining what is reasonable. *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 903 (9th Cir. 1994). The jury may consider defendant's financial resources in fixing an amount. *Rodgers v. Fisher Body Division, GM Corp.*, 739 F.2d 1102, 1109 (6th Cir. 1984). To prevent excessive awards, Congress limited the total punitive and compensatory damages available based on the employer's size. *See* 42 U.S.C. § 1981a(b)(3).

Under Ohio law, plaintiff may recover punitive damages only where defendant's actions or omissions demonstrate malice, egregious fraud, oppression, or insult or where defendant as principal or master ratified or participated in such actions or omissions. Ohio Rev. Code § 2315.21(c). *See also Delaney v. Skyline Lodge Inc.*, 95 Ohio App. 3d 264, 274, 642 N.E.2d 395, 402 (1994). Malice is defined as (1) that state of mind under which conduct is characterized by hatred, ill-will, or spirit of revenge, or (2) a conscious disregard for the rights and safety of others that has great probability of causing substantial harm. *Preston v. Murty*, 32 Ohio St. 3d 334, 336, 512 N.E.2d 1174, 1176 (1987).

A punitive damages award supported by substantial evidence should not be set aside. *Gutzwiller v. Fenick*, 860 F.2d 1317, 1329 (6th Cir. 1988). There is little guidance in this Circuit as to the facts necessary to support a punitive damages award in a hostile environment sexual harassment case; however, the decision whether to award punitive damages is clearly within the jury's discretion "as it requires the type of moral judgment that lay persons make every day." *Gutzwiller*, 860 F.2d at 1329. "The decisions of the trier of fact as to deliberate intent and as to credibility in cases based upon allegations of discrimination are not to be set aside unless clearly erroneous. . . . " *Erebia v. Chrysler Plastic Products Corp.*, Nos. 87-3297 and 87-3298, 1988 WL 125356 at *4.

Before instructing the jury, the Court held a jury charge conference during which it carefully considered the parties' arguments. Defense counsel did not request the Court to omit a punitive damages instruction or to limit the punitive damages instruction to discriminatory

discharge claim. Counsel also failed to object to the instruction before the jury retired. Therefore, the giving of the instruction cannot be assigned as error. Fed. R. Civ. P. 51.

The Court instructed the jury that: "[p]unitive damages may be awarded if you find that Plaintiff has shown by a preponderance of the evidence that Defendant's conduct involved reckless or callous indifference to Plaintiff's legal rights. In the alternative, you may award punitive damages if you find that Plaintiff has shown by a preponderance of the evidence that Defendant's conduct was characterized by hatred, ill will, evil motive or intent, or spirit of revenge." (Tr. p. 2037). The instructions properly stated that the jury had discretion to award punitive damages to punish the defendant and to deter similar future conduct. *See Rodgers*, 739 F.2d at 1109. The question of whether a defendant's conduct justifies a punitive damages award is well within the province of the jury. *Gutzwiller*, 860 F.2d at 1329.

The propriety of a punitive damages award in this case is a close question, because Black did not complain about much of the offensive conduct to Zaring Homes' management. The only evidence Black introduced on this point was a conversation she had with General Counsel Michelle Grigsby in the women's restroom while Grigsby was brushing her hair. The conversation took place after a land acquisition meeting where an offensive reference to the Hooters restaurant was made:

> Black: Michelle, I can't stand this in the land meeting. This is crazy. It's gotten out of hand. Has it always been like this?

Grigsby: Well, that's just the way it is.

Black: What can we do about it?

Grigsby: That's the way they are, Debbie. There is nothing you can do about it.

Black: Except that it takes up so much time. It doesn't make sense to spend quality business time to get our business done for them to go off on these little tangents and little schoolboy activities laughing and joking. It takes up way too much time, and we could get a lot more done if they would stick to the business at hand.

Grigsby: That's the way it is. That's the way they are, and you can't change it.

Black: I don't like it.

Grigsby: I don't like it, either, but there is nothing we can do.

(Tr. pp. 281-82).[3]

Black concedes that Zaring Homes had a sexual harassment policy that provided for reporting such incidents, but she claims she never received it. Doc. 65, p. 8. Other than the informal discussion with Grigsby in the ladies' restroom, Black never complained about sexual harassment to management officials.

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[3] Grigsby denied this conversation took place. For the purposes of this motion, we must assume the jury credited Black's version.

The following evidence, however, supports the jury's punitive damage award. In addition to Grigsby's knowledge of Black's informal complaint about conduct at the land acquisition meetings, Grigsby and other management officials were present at these meetings where offensive conduct toward Black took place. Company President Benkert himself engaged in such conduct by referring to Black dancing on tables at a "biker bar," a humiliating remark. The General Counsel was aware of the menstrual chart incident, which did not involve Black, and failed to take action. During the trial itself, in the presence of the jury, Zaring Homes officials and counsel took the position that there was nothing wrong with such conduct. They considered it harmless and normal in a business setting. The jury could reasonably have determined that these circumstances constituted callous and reckless disregard for women's rights in general and Black's rights in particular.

In deciding the motions regarding punitive damages, the Court may not substitute its interpretation for that of the jury. *L.E. Cooke Co.*, 991 F.2d at 343; *Agristor Leasing*, 869 F.2d at 268. Although different inferences can be drawn from the evidence presented, it cannot be said that the jury's award of punitive damages flowing from hostile environment sexual harassment was clearly erroneous. *See Erebia*, 1988 WL 125356.

IT IS THEREFORE ORDERED THAT:

1) Defendant's renewed motion for judgment as a matter of law is DENIED;

2) Defendant's motion for a partial new trial is DENIED; and,

3) Defendant's motion for remittitur of compensatory and punitive damages is DENIED.

Date: 12-27-95

/s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrate
Judge

No. 96-3118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBRA BLACK, Plaintiff-Appellee, v. ZARING HOMES, INC., Defendant-Appellant.	)	ORDER (Filed Apr. 25, 1997)

BEFORE: KENNEDY and BATCHELDER, Circuit Judges; and EDGAR,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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*Hon. R. Allan Edgar, United States District Judge for the Eastern District of Tennessee, sitting by designation.

(2)

Supreme Court, U.S.
FILED
AUG 28 1997
CLERK

No. 97-159

In The

Supreme Court of the United States

October Term, 1996

DEBRA BLACK,

Petitioner,

v.

ZARING HOMES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should This Court Issue A Writ Of Certiorari To Reconsider The Decision Of The Court Of Appeals That The Remarks At Issue In This Particular Case Were Insufficient Under The Well-Settled Principles Of Law Established By This Court To Create A Hostile Work Environment Based On Gender?

2. Should This Court Issue A Writ Of Certiorari To Reconsider A Decision Of A Court Of Appeals Where The Court Of Appeals Properly Met Its Obligation To Decide Issues Of Law And, Applying The Proper Standard Of Review, Reversed A Jury Verdict As A Matter Of Law?

RULE 29.6 LIST

Respondent Zaring Homes, Inc. is a wholly owned subsidiary of Zaring National Corporation, a publicly owned corporation. Zaring National Corporation also has the following wholly owned subsidiaries: HomeMax, Inc. and Zaring Holdings, Inc. In addition to conducting operations directly, Zaring Homes, Inc. also conducts operations through two limited-liability companies: Zaring Homes of Indiana, L.L.C., which has as its two members, Zaring Homes, Inc. and David P. Clark, and Zaring Homes Kentucky, LLC, which has as its two members, Zaring Homes, Inc. and Zaring Holdings, Inc.

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, Zaring Homes, Inc., respectfully requests that this Court deny Petitioner's request that a writ of certiorari be issued to the unanimous decision of the United States Court of Appeals for the Sixth Circuit entered on January 14, 1997 and reported at 104 F.3d 822 (6th Cir. 1997) (Kennedy, J.). Petitioner's Petition for Rehearing and Rehearing En Banc was denied on April 25, 1997.

STATEMENT OF THE CASE

The unanimous opinion of the Sixth Circuit Court of Appeals at issue here was based on a review of the record facts in the light most favorable to Petitioner Black ("Petitioner" or "Black"). The most significant facts relevant to Petitioner's claim of hostile-environment sexual harassment are set forth in the Court of Appeal's opinion and do not need to be repeated here (Petition, App. 1). However, Petitioner's Statement of the Case incorrectly describes the facts presented in proceedings below. The inaccuracies are material in several instances.

For example, Petitioner leaves the impression that she was the only female attending the bi-weekly land meetings and in her work environment generally (Petition, pp. 3, 27). However, Respondent's Vice-President and General Counsel, Michelle Grigsby (whom Petitioner does not name), is female and attended the land meetings

(Petition, App. 3). There were high-level female executives employed at the Company, including Zaring's Vice-President of Operations and Corporate Vice-President.

Petitioner alleges that she expressed disapproval at two remarks by saying, "Tim, cut it out" and "Not hardly, Ron" (Petition, pp. 3-4). However, there is *no* evidence that anyone heard her.

Petitioner alleges that her supervisor referred to a female as a broad while "looking straight at her" (Petition, p. 4). However, the record is clear that Black's supervisor was talking to Jeff Hafer, a male peer of Black, and that the supervisor used the word "broad" in reference to a county official, not a Zaring employee. There is no evidence that the remark was directed to or related to Black in any way (Petition, App. 5).

Petitioner also continues to assert what the record facts simply will not bear, i.e., that she complained to Michelle Grigsby, Vice-President and General Counsel, about the "gender-based remarks made at the land meetings" and that Grigsby responded that the "male supervisors' attitudes toward women were a fact of life" about which nothing could be done (Petition, p. 5). There is simply no record support for such assertions. The Court of Appeals correctly noted that Black once happened to run into Grigsby in the women's restroom. Black expressed her view that off-task talking at the land meetings "takes up so much time. It doesn't make sense to spend quality business time to get our business done for them to go off on these little tangents and little schoolboy activities laughing and joking" (Petition, App. 5). There is *no* evidence that Black complained about gender-based

remarks or that Grigsby said "male supervisors' attitudes toward women were a fact of life."

ARGUMENT IN SUPPORT OF DENYING THE WRIT

I. Should This Court Issue A Writ Of Certiorari To Reconsider The Decision Of The Court Of Appeals That The Remarks At Issue In This Particular Case Were Insufficient Under The Well-Settled Principles Of Law Established By This Court To Create A Hostile Work Environment Based On Gender?

There is no reason to grant certiorari on this question. The issue presented by *Black v. Zaring Homes* – the point at which sexually-connotative tastelessness becomes actionable harassment – has been answered by this Court already in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). The principles of law applicable to making the necessary distinction are well settled. Petitioner concedes that in *Harris*, the Court "created a fairly workable analytical framework for assessing the viability of a sexual harassment suit" (Petition, p. 27). Petitioner is simply unhappy with the Sixth Circuit's application of that well-established analytical framework to the unique and particular facts of her case. Petitioner's particularized unhappiness is not a proper basis to grant certiorari.

Petitioner realizes this and therefore alleges that there is a split among the circuits "as to whether workplace harassment, especially verbal workplace harassment such as the type addressed in this case, falls above

or below the 'de minimis' line as set forth in *Harris*" (Petition, pp. 9-10). Petitioner argues that the Sixth, Seventh and Tenth Circuits have adopted a "more conservative or restricted view" of what constitutes sexual harassment while the Second, Third, Eighth and Ninth Circuits have adopted a more "liberal and expansive view." Petitioner's argument fails for two reasons. One, such a split does not exist. Two, even if it did, the Supreme Court would not be able to resolve such a split by accepting this particular case for review.

A. There Is No Split Among The Circuits In The Application Of The Well-Settled Principles Of Law Established In *Harris* And *Meritor*.

Every circuit court of appeals recognizes the distinction set forth in *Harris* and *Meritor* between remarks that are "merely offensive" and those that reflect actual gender discrimination and affect the terms and conditions of employment to a sufficiently significant degree to violate Title VII. What causes courts of appeals to reach different results in different cases is not differing philosophies or analytical frameworks, but rather the very different facts unique to the various cases before them.

As this Court has recognized, sexual-harassment cases are highly fact intensive. A "cookie-cutter," "bright-line" definition of sexual harassment is simply not possible. Whether or not Title VII's prohibition against actual gender discrimination in employment has been violated depends on the facts and circumstances unique to each case.

The different results reached in the specific cases cited by Petitioner indicate only that very different facts – analyzed under the uniform criteria set down in *Meritor* and *Harris* – will dictate different results. The Supreme Court could not change that inevitability even if it were to grant review in this particular case.

The cases cited by Petitioner as illustrative of the "liberal" or "expansive" view are *Torres v. Pisano*, ___ F.3d ___, 1997 U.S. App. LEXIS 12805 (2d Cir. 1997), *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994), *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997) and *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994). However, the unique facts of these cases dictated a finding of actionable harassment under the principles established by this Court in *Meritor* and *Harris*, not the supposedly "liberal" stance of the reviewing courts.

In *Torres v. Pisano*, Plaintiff Torres, a Puerto Rican female, claimed not just sex but also race discrimination. She was the only female among the 30 employees who directly reported to her male supervisor, Eugene Coe. Coe constantly harassed Torres on the basis of her sex and race. He habitually referred to her as a "dumb cunt" and "dumb spic." He made insulting remarks about the size of her breasts and buttocks. He made sexual innuendos to Torres. He told other employees, in a crude way, that he wanted to have sex with Torres. He frequently told her to stay home, go on welfare and collect food-stamps like other "spics." When she called in sick, he told others that she was "probably out sucking cocks to earn extra money." He ridiculed her pregnancy by calling her "beer belly" and suggesting that she was too dumb to use birth control. He allowed his friends to say that Torres

gave blow jobs to men who came to the office and even allowed them to throw money at her and order her to strip. This behavior allegedly occurred without cessation over a four-year period.

The Second Circuit rejected the employer's claims that Torres' allegations, as a matter of law, did not suffice to establish the existence of a hostile work environment.[1] The Second Circuit followed *Harris'* teaching that a hostile work environment exists when, because of a plaintiff's gender, the workplace is *permeated* with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment. A hostile work environment is not created by conduct that is "merely offensive." *Torres*, p. 6 citing *Harris*, 510 U.S. at 21. The Second Circuit's recognition of the distinction required by *Harris* and *Meritor* is entirely consistent with the Sixth Circuit's holding in this case. The handful of mildly tasteless remarks complained of in this case are simply not comparable to the targeted and malignant abuse suffered by plaintiff Torres; at worst they were "merely offensive."

Steiner v. Showboat Operating Company, 25 F.3d 1459 (9th Cir. 1994), like *Torres* above, presents facts that are not in the same substantive universe as the facts in the

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[1] This rejection was *dicta* only. The Second Circuit's actual holding was that the employer in *Torres* was entitled to summary judgment in its favor on other grounds, i.e., no liability lies against an employer where an alleged victim of harassment specifically asks the person to whom she reports the harassment to keep the matter confidential and to refrain from taking corrective action. The actual holding of *Torres* is totally inapplicable to that in *Black v. Zaring*.

case at bar. Plaintiff Steiner's supervisor called her offensive names based on gender, such as "dumb fucking broad," "cunt" and "fucking cunt." He expressed disapproval inappropriately, e.g., "You are a fucking casino host. You comp every fucking fleabag that walks through the door" and "Why don't you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad?" He repeated the latter query two or three times. The supervisor sought her out to make insulting comments. He also insulted other women in sexually explicit terms, such as referring to their "big boobs." The behavior occurred at least over a two-year period and perhaps longer.

The facts and holding of *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994) are similarly inanalogous. In *Spain v. Gallegos*, the Third Circuit faced an atypical case. The facts of the case presented a strong *quid pro quo* element that is absent from many hostile-environment analyses. Plaintiff Spain alleged that her supervisor conditioned her promotion on her withdrawing a charge of discrimination and on her loaning him money periodically. She withdrew the charge and was promoted, but was forced to loan her supervisor money every month or two over a period of years. Because it was illegal for her government supervisor to accept loans from a subordinate, their meetings to arrange for the loans were always conducted in private. These private meetings led to rumors of an affair between them. Plaintiff Spain's increasing reluctance to lend money and her complaints about the rumors caused her supervisor to escalate his harassment of her, including his visiting her at her house. The rumors and meetings resulted in a tangible detriment to her career,

including the denial of a promotion because her integrity was questioned. The holding of *Spain* is wholly inapplicable to that in *Black v. Zaring*. Black alleged no *quid pro quo* element and no tangible career detriment. No one conditioned Black's career advancement on sexual or financial favors or on enduring rumors of an illicit affair. The two cases are simply inapposite.

In *Smith v. St. Louis University,* 109 F.3d 1261 (8th Cir. 1997), the fourth case cited by Petitioner as reflecting the "liberal" view, plaintiff Smith was an anesthesiology resident who was constantly harassed by the chairman of her department. He referred to her and other female residents by their first name while calling male residents "Doctor." He remarked that she was there because it was "about time he hired some good looking girls." He told her to consider modeling, asked why she polished her nails, and called her and other women "anesthesia babes." He queried why she had not chosen nursing or marriage over the role of doctor, opining that for women, marriage is the preferred route. He predicted that she could not find a husband. He sought out opportunities to ridicule her. His ridicule continued throughout her three-year residency. Male residents were not subjected to his barbs. Again, the facts are very different from the facts in the case at issue here. Petitioner Black was not subjected to a three-year stream of abuse from her direct supervisor. The remarks she complained of did not go to the heart of her workplace role. No one sought out opportunities to humiliate her for no other reason than that she was female.

The Sixth Circuit's decision in *Black v. Zaring Homes, Inc.* presents no conflict with the so-called "liberal" decisions cited by Petitioner. The facts of those cases, because they are so different, provide no rational basis to speculate how the so-called "liberal" reviewing courts would decide a case presenting the facts of *Black v. Zaring*. Black did not suffer a steady stream of sexual ridicule from her direct supervisor (or anyone else) which lasted literally for years. She did not suffer the sexually-explicit language of humiliation – "fucking cunt," "dumb spic," "dumb fucking broad," or the suggestion that women should "suck cocks" or give "blow jobs." She was free from the ridicule based on personal sexual characteristics such as "big boobs." There was no tangible adverse impact on Petitioner Black – no one conditioned a promotion on sexual or other favors and she suffered no career detriment. The harassers in the cases cited by Petitioner went out of their way to ridicule their victims, going so far as to drive to plaintiff's home or coming to work early in order to maximize their opportunity for harassment. None of those elements is present in *Black v. Zaring*.

Accepting Black's allegations as wholly true, the remarks she calls offensive were mild, sporadic, short-term and not prompted by her gender. A one-time use of the vernacular word "broad" for a county official, general snickering at the surname of "Busam" or the neighborhood name suggestion of "Hooterville" for land located next to a Hooter's Restaurant is simply not in the same universe as calling a woman a "fucking cunt" or as conditioning promotions upon loans or enduring rumors that go to one's sexual and professional integrity.

The cases from the Second, Third, Eighth and Ninth Circuits are not in conflict with *Black v. Zaring*.[2] Indeed, the consistency with which the circuit courts of appeals have applied the legal standards set forth in *Meritor* and *Harris* is remarkable.

Struggling for a reason to justify review, Petitioner asserts that the Sixth Circuit held that comments made in the presence of a female employee are less coercive than comments made directly to her (Petition, p. 19). That assertion misrepresents the Sixth Circuit's holding. The court did not create a new standard with respect to

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[2] Petitioner argues that the decisions from the Second, Third, Eighth and Ninth Circuits conflict with decisions from the "conservative" Seventh and Tenth Circuits as well. There is "conflict" only so far as the cases' very different fact patterns require it. In any event, decisions from the Seventh and Tenth Circuits are not at issue here. *Black v. Zaring* is not the proper vehicle to resolve any alleged conflict between *Baskerville v. Culligan Int'l. Co.*, 50 F.3d 428 (7th Cir. 1995) and *Torres*, e.g.

Petitioner also argues for review on the basis of so-called "splits" in appellate court thinking that have no relevance to this case. Petitioner argues that the Tenth Circuit established a two-tiered standard for reviewing claims of sexual harassment, one for blue-collar and one for white-collar working environments. Petitioner also argues that the Tenth Circuit judged on-the-job sexual harassment in the context of off-the-job community standards. Even if that were an accurate characterization of the Tenth Circuit's holding in *Gross v. Burggraft Construction Co.*, 53 F.3d 1531 (10th Cir. 1995), it is irrelevant to this petition. The issues of blue-collar vs. white-collar and on-the-job vs. community standards did not arise and were not addressed in *Zaring*. The Court should not grant a review of the Sixth Circuit's decision in *Black v. Zaring* to correct some perceived imperfections in the analysis by the Tenth Circuit of issues not present in *Black*.

victim-targeted remarks; indeed, it specifically disclaimed doing so. "While we *emphasize* that sex-based comments need *not* be directed at a Plaintiff in order to constitute conduct violating Title VII, we note that in this case most of the comments were not directed at Plaintiff; this fact *contributes* to our conclusion that the conduct here was not severe enough to create an objectively hostile environment" (Petition, App. 10, emphasis added). That most of the remarks at issue in *Black v. Zaring* were part of general repartee and did not target Black was merely one of the many factors that contributed to the Court of Appeal's legal conclusion that the particular remarks at issue in the circumstances of this case were not severe enough to create a hostile environment. Ironically, the court in *Torres, supra,* a decision argued by Petitioner to be in conflict with the decision in *Black v. Zaring,* specifically relied on and cited to the *Black* decision for its observation that sex-based comments need not be directed at plaintiff in order to be actionable. *Torres,* p. 18.

The Supreme Court, in two separate opinions, has set forth clear standards governing when unwelcomed harassment based on gender becomes sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The Court has made clear that the offending conduct must be judged both by an objective and subjective standard, and that all of the facts and circumstances unique to each case must be considered. Whether an environment is "abusive," as opposed to unpleasant or unprofessional, depends on such factors as the frequency of the discriminating conduct, its severity, whether it is physically threatening or

humiliating or a mere offensive utterance and whether it unreasonably interferes with an employee's work performance. *Harris*, 114 S.Ct. at syllabus (b) and 371, 126 L.Ed. 2d at 302-03. The Sixth Circuit recognized and applied those criteria of legal analysis to the facts of the case before it. That Petitioner is unhappy with the result is not a proper basis to grant certiorari. Petitioner has not identified a principle of law that would be resolved by granting review of this case. Accordingly, Petitioner's request should be denied.

II. Should This Court Issue A Writ Of Certiorari To Reconsider A Decision Of A Court Of Appeals Where The Court Of Appeals Properly Met Its Obligation To Decide Issues Of Law And, Applying The Proper Standard Of Review, Reversed A Jury Verdict?

The answer to this question is clearly no. A review of Petitioner's request in this regard requires the same conclusion. Petitioner concedes that, in reversing the jury verdict below, the Sixth Circuit decided that no "trier of fact could reasonably conclude that the work environment was anything more than merely offensive" (Petition, p. 26). This question of law – whether the conduct alleged in this case met the standards laid down by this Court in *Meritor* and *Harris* – was squarely within the court's decisional authority. The Sixth Circuit met its obligation to decide an issue of law and did so in accordance with well settled principles of law previously established by this Court.

A. Petitioner Has Misstated The Applicable Standard Of Review Below.

Petitioner baldly misstates the standard of review to be applied by the Sixth Circuit in this case. Petitioner states: "It is well-established in federal jurisprudence that a court of appeals may not set aside the verdict of a jury . . . unless it is clearly erroneous or non-plausible" (Petition, p. 22).

The "clearly erroneous" standard applies only when the reviewing court challenges the findings of the trier of fact. That standard of review has no relevance to the issue here. The Sixth Circuit did not challenge the jury's findings of fact, as the reviewing court did in *Anderson v. City of Bessemer City, North Carolina,* 470 U.S. 564, 573, 105 S.Ct. 1504 (1985), a case cited by Petitioner. The Sixth Circuit made clear that it did not "weigh the evidence, evaluate the credibility of the witnesses, or substitute [its] judgment for that of the jury" (Petition, App. 7). It took the jury's findings at face value and concluded that Petitioner failed to establish a cause of action against Respondent as a matter of law. Therefore, the "clearly erroneous" standard was not applicable to the court's review.

The Sixth Circuit was asked to review a denial for judgment as a matter of law under Fed. Rule Civ. Pro. 50. The applicable standard of review for questions of law is *de novo. U.S. v. U.S. Gypsum Co.,* 33 U.S. 364, 365, 68 S.Ct. 525 (1948), a second case cited by Petitioner, makes that clear. In *U.S. Gypsum,* the Supreme Court (sitting as a reviewing court), in addition to setting aside the trial court's findings of fact as clearly erroneous, found that

the district court had misapplied the law. The Supreme Court, referring to errors of law below, specifically held. "These [errors of law] we can, of course, correct." *Id.* at 394.

B. There Is No Split Among The Circuits With Respect To Deference To Jury Verdicts In Hostile-Environment Sexual-Harassment Cases.

In addition to misstating the applicable standard of review below, Petitioner attempts to justify review by alleging a second split among the Circuit Courts of Appeals: a split between those courts which show "judicial deference" to jury verdicts and those that take a "more activist role" (Petition, pp. 23-24). Again, however, there is no such split. The results in the decisions cited by Petitioner differ not because particular circuits are prone to judicial "deference" or "activism," but because the facts before them are different. In support of her position, Petitioner has done nothing more than cite to seven different cases with seven different fact patterns with the pronouncement that some presented a jury question while some did not. That is not news and it certainly is not a basis to grant certiorari. Fact patterns inevitably will vary and will require different results under the uniform guiding principles of established precedent.

The cases cited in the Petition as examples of judicial deference do not stand for the untenable proposition, implicitly urged by Petitioner, that hostile-environment cases can never be decided as a matter of law. Rather, as discussed above, in the cases cited by Petitioner where a

jury question was held to exist, it existed only because of the particular facts unique to that case.

The *Torres* court, claimed by Petitioner to be a "deferential" court, recognized that "conduct that is 'merely offensive' and 'not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview.' " *Torres* at *11, quoting *Harris,* 510 U.S. at 21. There is nothing in the Second Circuit's recognition of that legal distinction to distinguish its approach from the approach taken by the Sixth Circuit in this case or the Seventh Circuit in *Baskerville, supra.*[3]

The other decisions cited by Petitioner as reflecting a more activist role are not helpful to the analysis of this case. In *Spicer v. Commonwealth of Virginia,* 66 F.3d 705 (4th Cir. 1995) and *Mattern v. Eastman Kodak Co.,* 104 F.3d 702 (5th Cir. 1997) the legal issue was not the existence of an objectively hostile environment. *Spicer* concerned the adequacy of the corrective action taken; *Mattern* was a retaliation case. Those issues are not relevant to the holding of *Black v. Zaring.*

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[3] It should be noted that in *Torres* the Second Circuit affirmed the district court's grant of summary judgment in favor of the employer. The Second Circuit did resolve the issue before it – whether an employer can be held liable where a victim of harassment asks that no action be taken – as a matter of law.

Petitioner's second question for review must be denied for the same reason as the first question. Petitioner has cited no split among the circuits on any important principle of law. The differing results among the courts of appeals are dictated by the different facts of the cases before them and not by a philosophy of "deference" or "restraint." Moreover, even if such a split exists, accepting this case for review would not create an opportunity to resolve it. The facts of cases cited by Petitioner as reflecting a philosophy of deference are so inanalogous to the facts of the case at bar that meaningful comparison is not possible.

CONCLUSION

The Petition contains misstatements of record facts and misstatements of law. The Petition alleges that there is a split of authority among the circuits when, in fact, the circuit courts have been remarkably consistent in applying the standards of *Harris* and *Meritor* to the very different sets of facts before them. Petitioner essentially is asking the Supreme Court to review the Court of Appeals decision in this case because she lost and she wants to

win. That request, while understandable, is an insufficient basis to grant review. Accordingly, Petitioner's request for review should be denied.

Respectfully submitted,

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No. 97-159

In The

Supreme Court of the United States

October Term, 1996

DEBRA BLACK,

Petitioner,

v.

ZARING HOMES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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14 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHERE AN EMPLOYEE IN A TITLE VII SEXUAL HARASSMENT CASE ADDUCES SUBSTANTIAL EVIDENCE OF GENDER-BASED VERBAL SEXUAL HARASSMENT DIRECTED TOWARD HER BY VARIOUS MALE EMPLOYEES IN THE SUPERVISORY HIERARCHY OF HER EMPLOYER, WHAT CRITERIA SHOULD FEDERAL COURTS EMPLOY IN DETERMINING WHETHER THE CONDUCT ALLEGED AGAINST THE EMPLOYER WAS SUFFICIENTLY *DE MINIMIS* SO AS TO RENDER THE EMPLOYEE'S SEXUAL HARASSMENT ALLEGATIONS NON-ACTIONABLE?

II. WHERE A TITLE VII PLAINTIFF HAS ADDUCED EVIDENCE AT TRIAL THAT SEVERAL GENDER-BASED HOSTILE REMARKS WERE DIRECTED TO HER BY VARIOUS MEMBERS OF THE ALL-MALE SUPERVISORY HIERARCHY OF HER EMPLOYER, INCLUDING ITS PRESIDENT, AND PLAINTIFF'S COMPLAINT TO THE EMPLOYER'S GENERAL COUNSEL ABOUT THE HARASSMENT WAS IGNORED, TO WHAT EXTENT MAY THE REVIEWING COURT SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF A JURY AND SET ASIDE A JURY VERDICT TO THE EFFECT THAT THE EMPLOYER'S CONDUCT TOWARD PLAINTIFF WAS SUFFICIENTLY SEVERE AND PERVASIVE SO AS TO CREATE AN OBJECTIVELY HOSTILE WORK ENVIRONMENT?

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STATEMENT OF THE CASE

This Court has been fully informed of the underlying facts and procedural posture of this case in the Petition for Writ of Certiorari and Respondent's Brief in Opposition to Certiorari. (Petition, pp. 2-7; Brief in Opposition, pp. 1-3).

ARGUMENT

Respondent recently requested this Court to deny Petitioner's request for a writ of certiorari to resolve the two questions presented. On the one hand, Respondent attempts to rebut Petitioner's demonstration of a split amongst the circuit courts as to what constitutes actionable sexual harassment by claiming that "different facts" have produced the differing results. (Respondent's Brief in Opposition, pp. 4-12). However, for the remainder of its brief, Respondent argues that judges can and should resolve cases of this sort as a matter of law. (Respondent's Brief in Opposition, pp. 12-16). A close examination of Respondent's brief reemphasizes the need for guidance on these issues by this Court. Accordingly, this Court should grant Petitioner's request for a writ of certiorari.

I. The Circuit Courts Continue to Remain Split on the Issue of What Constitutes Actionable Verbal Sexual Harassment.

Stated simply, the circuit courts are split on their understanding of what constitutes actionable verbal harassment in a hostile work environment claim under Title VII. Petitioner has already provided this Court with a thorough treatment of caselaw to support this proposition. (Petition, pp. 10-17). Since the time Petitioner filed their request for a writ of certiorari, subsequent circuit court decisions have been rendered which demonstrate that the split not only remains unresolved but continues to grow wider.

The Fourth Circuit Court of Appeals has recently added their voice on the issue. Adopting the reasoning established in *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995), the Fourth Circuit has sided with the Sixth, Seventh and Tenth Circuits by endorsing a more restrictive application as to what constitutes actionable verbal harassment. *Hartsell v. Duplex Products, Inc.*, ___ F.3d ___, 1997 U.S. App. LEXIS 22545 (4th Cir. August 25, 1997). In that case, the plaintiff was the target of comments from her male co-workers and supervisors such as, "We've made every female in this office cry like a baby. We will do the same to you. Just give us time." *Id.* at *4. Further, she was referred to as one of "the little people" and informed by one of her male employers that she "would become the slave." *Id.* Additionally, the plaintiff was present when two male employers were looking at a magazine with a picture of a woman who "was rather buxom and was wearing a lowcut T-shirt," when one of the male employers commented, "Why don't we have sales assistants that look like that[?]" *Id.* at *5. Also, the plaintiff in that case was asked if after the birth of her child she would be a "mini-van driving mommy" or "be a salesperson and play with the big boys." *Id.* Finally, several male co-workers referred to the plaintiff's stay-at-home husband as her "wife" and asked her, "Why don't you go home and fetch your husband's slippers like a good little wife. . . . " *Id.* at *5-6.

The Fourth Circuit affirmed the district court's granting of summary judgment to the defendant, stating that the conduct plaintiff complained of consisted "of no more than mildly offensive (and unactionable) utterances." *Id.* at *17. The court was persuaded by the fact that many of the comments were not gender-specific. *Id.* Further, the Fourth Circuit was also highly influenced by the fact that the plaintiff was not "inappropriately touched, propositioned, flirted with, taunted, or even ogled." *Id.* at *21, (*citing Baskerville*, 50 F.3d at 431).

Hartsell is but one additional manifestation of the growing rift between the various circuits on the standard for determining *de minimis* versus actionable sexual harassment. For instance, comparing the Fourth Circuit's position as articulated in *Hartsell* with that of the Eighth Circuit's opinion in *Smith v. St. Louis University,* 109 F.3d 1261 (8th Cir. 1977), (Petition, pp. 15-16), the need for this Court to harmonize the divergent circuit decisions becomes apparent. In *Smith,* the Eighth Circuit found actionable harassment in far less aggravated conduct which essentially consisted of the chairman of a medical department referring to women residents by their first names and the male residents by the term "Doctor," commenting that it was "about time that he hired some good looking girls," and referring to the plaintiff and other women employees as "anesthesia babes." *Id.* at 1262.

Like the present case, both *Hartsell* and *Smith* dealt exclusively with alleged sexual harassment based upon various verbal statements made and/or condoned by male supervisors to female employees. A reasonable examination of the evidence of the two cases reveals the severity of the comments to be approximately equal. However, in one instance, the circuit court concluded that the comments did not rise to the level of actionable sexual harassment, while the other circuit court held that the comments clearly did support a viable claim for a hostile work environment. Some courts, such as the *Hartsell* court, appear to require actual physical touching or direct propositioning in order to support a claim. 1997 U.S. App. LEXIS 22545 at *21. On the other hand, other cases, such as *Smith,* have found actionable harassment based upon relatively milder, indirect comments. 109 F.3d at 1261.

Respondent dwells unnecessarily on what it perceives to be the low level of harassment in the case at bar as compared to other cases of verbal sexual harassment

where the circuit courts have upheld the Title VII violation. However, the issue before this Court is not how outrageous the facts of the case at bar are in comparison with the facts in other cases.[1] The facts of this case are more aggravated than those in some cases and less aggravated than those in others. The true issue which begs this Court's clarification is the standard which would be adopted to determine whether sexual harassment is sufficiently *de minimis* to be non-actionable. Should it be the

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[1] This is not, however, to concede that the facts in this case are not outrageous. All of the comments were directed to Petitioner alone, the one female in a room of several taunting males, all of them managers, including the president of the company. Conversations were permeated with female anatomical references. The double entendre of the "sticky buns" comment directed to Petitioner is particularly demeaning and humiliating. (Petition, p. 3). The reference to "sticky buns in the morning" is a crude sexual reference so obvious it need not be repeated here. What makes the facts of this case especially egregious is the fact that many of the comments were countenanced by or even uttered by the President of the company in the presence of Petitioner and her male co-workers. Additionally, when she complained to the General Counsel, who was familiar with the laws on sexual harassment, she was told nothing could be done about it, and that gender-ridicule was part and parcel of the work environment. (Petition, p. 5).

Furthermore, while the sexual harassment in the other cases relied upon by Petitioner took place over a longer period of time, the fact that all of the harassing remarks in this case occurred in a mere four month period simply highlights the concentrated nature of Respondent's misconduct.

Finally, Respondent's attempt to downplay the severity of its conduct before this Court is belied by the fact that a jury had no trouble finding its course of conduct actionable. In fact, it went the extra mile to unanimously recommend, in its jury verdict, that Respondent initiate diversity/harassment training (App. p. 24) and pay $250,000 in punitive damages. (App. pp. 28-29).

"public mores" standard (*see Baskerville*, 50 F.3d at 431; *Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995)), the "directed at" versus the "in the presence of" standard (*see Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997)),[2] or the absence-of-physical-touching standard (*see Hartsell*, 1997 U.S. App. LEXIS 22445 at *21), acknowledged by the Fourth, Sixth, Seventh, and Tenth Circuits. Or, on the other hand, should this Court be guided by whether women are exposed to onerous working conditions to which men are not exposed, the standard enunciated by the Second, Third, Eighth, and Ninth Circuits. *See Torres v. Pisano*, ___ F.3d ___, 1997 U.S. App. LEXIS 12805 at *17 (2nd Cir. 1997); *Spain v. Gallegos*, 26 F.3d 439, 447-48 (3rd Cir. 1994); *Smith*, 109 F.3d at 1263-65; *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994). This case squarely presents this Court with issues which are unresolved in the circuit courts and need clarifying. Accordingly, this Court should grant Petitioner's request for a writ of certiorari.

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[2] Respondent persists in arguing that *Black v. Zaring* does not go so far as holding that sexual comments made merely in the presence of an employee are non-actionable. Respondent cites to the Sixth Circuit's language that sex-based comments need not be directed to a plaintiff in order to be actionable, but the fact that most of the comments in this case were not directed to Petitioner merely "contributed to" its conclusion that the conduct was not severe enough to create an objectively hostile work environment. However, irrespective of what the Sixth Circuit said, the fact remains that it did not cite any other specific evidence to support its finding that the workplace was not sufficiently hostile. The Sixth Circuit did not address the issues of the frequency, humiliating, or coercive level of any of the specific remarks, nor Petitioner's degree of mental anguish. In the absence of any other specific evidence cited by or relied upon by the Sixth Circuit, one must assume that the fact that most of the comments were not directed at Petitioner constituted the sole basis for its legal conclusion.

II. The Argument Advanced by Respondent Blurs the Distinction Between Various Standards of Review and Requires Clarification by This Court.

Respondent contends that the reversal by the Sixth Circuit was proper because Respondent was not challenging the jury's conclusions, but rather was questioning to the district court's failure to grant Respondent's Rule 50 motion for a judgment as a matter of law. Accordingly Respondent contends that the Sixth Circuit appropriately conducted a *de novo* review of a legal question rather than applying the "clearly erroneous" standard associated with findings of fact. This argument highlights an issue which must be resolved by this Court: What standard of review must an appellate court employ when a trial court makes rulings that turn on questions of fact or mixed questions of law and fact? Respondent's argument blurs the distinction between rulings which must be reviewed under a "clearly erroneous" standard of review and those which should be reviewed *de novo.*

As Justice Scalia stated while writing for this Court, "[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood,* 487 U.S. 552, 558, 108 S.Ct. 2541, 2546, 101 L.Ed.2d 490 (1988). The question of which of these standards of review is applicable becomes troublesome in a case such as the case *sub judice* where a trial court denies the Respondent's request for judgment as a matter of law because the resolution of the case is intertwined with factual issues. Subsequently, in the case at bar, the district court submitted the case to the jury which found for the Petitioner. The Respondent then appealed the trial court's denial of its Rule 50 motion to the Sixth Circuit. Respondent attempted, successfully as it turned out, an end run around the findings of the jury by its appeal under the guise of a request for a *de novo* standard of review. If the Sixth Circuit's decision is accepted, the

traditional role of the factfinder will be undercut and the power of appellate court judges will be significantly increased. Such a decision should not be sanctioned without full consideration and opinion of this Court.

Respondent argues that this case does not involve the Sixth Circuit's setting aside of a jury verdict, but rather its Rule 50 determination that the quantum of the record evidence of sexual harassment was insufficient as a matter of law to warrant submission of the case to the jury in the first place. However, this is a distinction without a difference. The issue is in truth the same: When a federal reviewing court analyzes a sexual harassment case in the context of the fact-specific criteria set forth in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 1226 L.Ed.2d 295 (1993), under what circumstances can the trier of fact be deprived of its ability to determine whether the *Harris* criteria have been met? Or, stated another way, to what extent may a reviewing court substitute its view of the facts for those of a jury by merely casting its decision as one where insufficient record evidence exists to allow the case to go to the jury?

As discussed fully in the Petition for Certiorari, the circuit courts are split on the amount of deference to be accorded to the factfinder in cases such as the case *sub judice*. (Petition, pp. 22-27). Additionally, the Sixth Circuit's holding runs counter to the precedent previously provided by this Court. For instance, Justice White, speaking for this Court, has stated:

> The trial judge's major role is the determinations of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that

> their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' "

Anderson v. City of Bessemer, 470 U.S. 564, 574, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985). In the case at bar, however, Respondent was able to turn the appeal into the "main event" of the litigation. Furthermore, the approach endorsed by the Sixth Circuit will have the effect of requiring litigants to re-focus their energies and resources on persuading the appellate court to resolve issues typically reserved to the finder of fact.[3]

Furthermore, Respondent's argument faces additional problems when considered in light of this Court's statement that:

> By reason of settlement conferences and other pretrial activities, the district court may have

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[3] The flaw in Respondent's argument and, implicitly, the Sixth Circuit's holding, is best demonstrated by examining Respondent's argument in its entire context. The crux of Respondent's argument and the Sixth Circuit's holding is that reviewing courts can and should resolve sexual harassment cases such as the case at bar as a *matter of law.* (Respondent's Brief in Opposition, pp. 13-14). This argument sounds appealing until it is compared with the remainder of their argument. Respondent refutes Petitioner's claim that there is no split amongst the circuits on the standard for actionable verbal harassment by arguing that *factual distinctions* create the apparent split. On the one hand, Respondent attempts to characterize this issue as a clearly defined area which courts (either trial or appellate) should decide as a pure question of law. However, when it better serves its argument, Respondent emphasizes the highly factual nature of these cases. It is precisely these types of logical inconsistencies which are likely to be repeated should this Court refrain from providing guidance on these issues.

> insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

Pierce, 487 U.S. at 560, 108 S.Ct. at 2547.

Petitioner does not contend that a sexual harassment case can never be decided as a matter of law. Justice Souter, writing for this Court, recognized that issues on appeal break down into one of three types: purely legal issues, purely factual issues, and issues of mixed law and fact. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 630, 113 S.Ct. 2264, 2283, 124 L.Ed.2d 539 (1993). Petitioner concedes the appropriateness of *de novo* review on purely legal issues, as well as on mixed question of law and fact (assuming a thorough and sufficient showing that the legal issues predominated over any factual issues). In the case at bar, however, the Sixth Circuit did not make such findings. Therefore, the issue, which this court must address is given the existence of factual issues, may a reviewing court avoid the conclusions of the factfinder by applying a *de novo* standard of review?

This Court has long recognized the significance of standards of review in various forms of litigation. *Pierce*, 487 U.S. at 558, 108 S.Ct. at 2546. Additionally this Court

has also consistently recognized that district and appellate courts each serve significant but distinct functions in the administration of justice. *Anderson*, 470 U.S. at 574, 105 S.Ct. at 1512; *Pierce*, 487 U.S. at 560, 108 S.Ct. at 547. Respondent's argument threatens to blur these well-established distinctions. This issue transcends Title VII litigation and implicates the standards of review in all civil litigation. Unless this Court grants certiorari in this instance, the clarity of these standards of review will remain muddled. The practice of allowing appellate courts to reverse jury verdicts under the guise of a *de novo* review threatens to eradicate the clearly erroneous standard of review thus resulting in reviewing courts arrogating onto themselves factfinding functions traditionally reserved for the jury. Accordingly, guidance from this Court is sought on this issue.

CONCLUSION

For the reasons set out fully above, and also for all of the reasons fully explained in Petitioner's original Petition for Writ of Certiorari, Petitioner respectfully requests that a Petition for Writ of Certiorari be granted to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DONALD B. HORDES